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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 46

JAMES J. OESTEREICH,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING, COLONEL JACK P. BRUBAKER, Wyoming Selective Service Director,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The Order of the United States District Court, District of Wyoming (A. 13-18), is reported at 280 F. Supp. 78. The opinion of the Court of Appeals for the Tenth Circuit (A. 20) is reported at 390 F. 2d 100.

Jurisdiction

The judgment of the Court of Appeals was entered on February 21, 1968. The petition for certiorari was filed on March 19, 1968 and was granted on May 20, 1968. The jurisdiction of this Court rests on 28 U. S. C. §1254(1).

Statutes and Regulations Involved

Section 10(b)(3), Military Selective Service Act of 1967; 50 App. U. S. C. §460(b)(3):

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Section 6(g), Military Selective Service Act of 1967; 50 App. U. S. C. §456(g):

> "Ministers of religion.—Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled shall be exempt from training and service (but not from registration) under this title."

Selective Service Regulation 1617.1; 32 C. F. R. §1617.1:

"Effect of failure to have unaltered registration certificate in personal possession.—Every person required to present himself for and submit to registration must, after he has registered, have in his personal possession at all times his Registration Certificate (SSS Form 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register. When a registrant is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Registration Certificate (SSS Form 2) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, and such certificate shall be destroyed by the officer to whom it is surrendered."

Selective Service Regulation 1642.4(a); 32 C. F. R. §1642.4(a):

"Declaration of Delinquency Status and Removal Therefrom.—(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form 252) or the duty to comply with an Order to Report for

Civilian Work and Statement of Employer (SSS Form 153), the local board may declare him to be a delinquent."

Questions Presented

Petitioner, a student preparing for the ministry, was exempt from training and service in the Armed Forces under Section 6(g) of the Military Selective Service Act of 1967 [50 App. U. S. C. §456(g)]. Upon returning his Selective Service Registration Certificate to the government as a statement of protest against the war in Vietnam, petitioner was declared delinquent under the Selective Service regulations, stripped of his exemption, reclassified I-A and ordered to report for induction. Under these circumstances:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U. S. C. §460(b)(3)] preclude judicial review of petitioner's punitive reclassification and order to report for induction?

2. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Registration Certificate in his personal possession, violate the due process clause of the Fifth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

3. Does Selective Service Regulation 1617.1 [32 C. F. R. §1617.1], as construed and applied in this case, and Selective Service Regulation 1642.4(a) [32 C. F. R. §1642.4(a)] on its face, violate the First Amendment?

4. Does a registrant in fact violate Regulation 1617.1 if he does not have his Registration Certificate in his personal possession?

Statement of the Case[1]

Petitioner is a duly enrolled student "preparing for the ministry" at Andover-Newton Theological School, Newton Centre, Massachusetts, a "recognized theological or divinity school." Military Selective Service Act of 1967, Sec. 6(g), 50 App. U. S. C. Sec. 456(g) [hereinafter "Act"]; 32 C. F. R. Sec. 1622.43(a)(4) [hereinafter "Regs."]. As such, he was classified IV-D by Local Board No. 11 on June 20, 1966 and thus exempt from military service (A. 3).

On October 16, 1967, together with numerous other persons, petitioner returned his Selective Service registration certificate (SSS Form 2) to the United States Government solely for the purpose of registering his dissent from participation by the United States in the war in Vietnam (A. 3). Petitioner, by affidavit, explained in detail his reasons for returning his registration certificate. He described it as "an act of collective conscience in support of our dying and suffering brothers who are presently fighting on our behalf in Vietnam," and "a responsible expression of concerned citizens, acting in light of the first amendment." His act was based upon his "understanding of the claims which the Christian faith brings to bear on the human situation" including the belief that "man responds to God's revelation by concrete participation in the structures and

[1] The Statement of the Case is based upon the allegations in the complaint, taken as admitted upon the government's motion to dismiss. *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947).

decisions of life, with a transcending loyalty to the will of God, the authority of the scriptures, and the community of interpretation which is the church," and in his belief in the doctrine of the "Just War". He stated his belief that "the Viet Nam situation reveals this war to be in violation of most of the criteria of the just war doctrine and is a major threat to the security and peace of the world" (A. 7-11).

On November 7, 1967, Local Board No. 11 mailed petitioner a Delinquency Notice (SSS Form 304) informing him that he "became delinquent" on October 20, 1967. The Delinquency Notice advised petitioner that he was delinquent for the following reasons: (1) "Failure to have in his possession a duly authorized Registration Certificate (SSS Form 2)" and (2) "Failure to provide the local board of his current status" (A. 4).[2]

Simultaneously, on November 7, 1967, Local Board No. 11 mailed petitioner a Notice of Classification (SSS Form 110) reclassifying him I-A (A. 4).[3] Petitioner duly appealed his I-A reclassification to the Selective Service Appeal Board for the State of Wyoming which unanimously affirmed the classification on December 27, 1967.[4] On the same day, December 27th, Local Board No. 11 mailed petitioner an order to report for induction in Cheyenne, Wyoming, at 3:00 P.M. on January 24, 1968 (A. 4).[5]

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[2] The Delinquency Notice is reproduced in the Appendix, *infra*, p. 2a.

[3] Class I-A indicates that a registrant is "Available for Military Service." Reg. 1622.10.

[4] Thereby exhausting administrative remedies (A. 4).

[5] Petitioner's place of induction was subsequently transferred, pursuant to Reg. 1632.9, to Dorchester, Massachusetts, and postponed to February 26, 1968.

On January 19, 1968, suit was filed in the United States District Court for the District of Wyoming to enjoin petitioner's induction into the armed forces. Oral argument was heard on January 22, 1968, on petitioner's application for a temporary restraining order. After oral argument, respondents' Motion to Dismiss was granted from the bench. An order dismissing the action was entered that day (R. 23-24), a subsequent *nunc pro tunc* order was entered on January 23, 1968 (R. 25), and an Order Setting Aside Prior Orders and Dismissing Plaintiff's Action was entered on February 6, 1968 (A. 13-18).

The District Court's February 6th order found, among other things, that the action did "not arise under the Constitution, laws or treaties of the United States" (A. 14), that the matter in controversy did not exceed $10,000 (*ibid.*), that there was no diversity of citizenship (A. 15), that it was divested of jurisdiction because of Sec. 10(b)(3) of the Act (A. 15-16), that "to assume jurisdiction over plaintiff's action would violate the fundamental constitutional precept of separation of powers . . ." (A. 16), that petitioner knew that he was required to have his registration certificate in his possession at all times (*ibid.*), that "exemptions and classifications are a privilege, not an inalienable right conferred by the Constitution or statute" (A. 16-17), and that the action complained of "does not constitute penal action" (A. 17).

Notice of Appeal was filed on February 6, 1968 (R. 34), and an expedited appeal was heard by the Tenth Circuit on February 19, 1968. On February 21, 1968, the Court of Appeals affirmed the decision below in a *per curiam* decision which reads in its entirety as follows:

"The judgment is affirmed for the reasons set forth in the memorandum decision of the trial court and particularly in view of the jurisdictional restrictions contained in 50 App. U. S. C. §460(b)(3). Orderly classification of a registrant for military service is not punitive in nature. Compare United States v. Capson, 10 Cir., 347 F. 2d 958. Appellant is not denied his right to ultimate judicial review of his claimed rights. Witmer v. United States, 348 U. S. 375, 377."

An application for a stay was denied by the Tenth Circuit on February 23, 1968. On the same day an application to stay petitioner's induction was presented to Mr. Justice White. On March 5, 1968, after the government had agreed to the postponement of petitioner's induction to allow time for consideration of the stay application, Mr. Justice White issued an order staying "the execution and enforcement of the judgment of the United States District Court for the District of Wyoming, as affirmed by the United States Court of Appeals for the Tenth Circuit . . ." on the condition that this petition for certiorari be filed on or before March 19, 1968. The petition was filed on that date.

In his Memorandum for Respondents, the Solicitor General took the position that the Court should reverse the judgment below and, subject to establishment of the requisite jurisdictional amount, direct that a decree be entered in petitioner's favor. The position was based on the Solicitor General's acknowledgement that the Local Board had deprived petitioner of a mandatory exemption granted by Congress in Sec. 6(g) of the Act and that the Sec. 10 (b)(3) prohibition of pre-induction judicial review ought to be construed "to exclude purported action of a board

which is in fact contrary to an exemption which has been expressly granted by statute" (Memorandum for Respondents, p. 12).[6]

Summary of Argument

I. The Federal Courts Have Jurisdiction to Hear and Determine This Suit.

A. *Effective Judicial Review of the Classification Orders of Local Boards Is Constitutionally Required.*

The Constitution requires judicial review of the orders and actions of administrative agencies. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967); *St. Joseph's Stockyard* v. *United States*, 298 U. S. 38 (1936). *Lockerty* v. *Phillips*, 319 U. S. 182 (1943); and *Yakus* v. *United States*, 321 U. S. 414 (1944), which are often cited as examples of extreme judicial deference to congressional efforts to preclude judicial review of agency action, in fact stand for the

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[6] The Memorandum for Respondents also adverts to the fact that petitioner was declared delinquent and reclassified I-A not only for turning in his Registration Certificate but also for his "Failure to provide the local board of his current status," and says that "to overturn the administrative action, [petitioner] is under the burden of showing that all grounds of decision are invalid" (pp. 10-11). Beyond the fact that it is improbable that this case would have gone as far as it has simply because of petitioner's failure to notify his Local Board that he was enrolled in a recognized divinity school, Local Board No. 11 was advised of petitioner's current status as a divinity student when it was served with the complaint in this case and again when, by letter dated April 17, 1968, petitioner's school so informed the Board. Furthermore, the Solicitor General, Attorney for Respondents, personally "confirmed" the fact that petitioner "is a full-time student in good standing at . . . . a 'recognized theological or divinity school'" (Memorandum for Respondents, p. 11), thus purging that aspect of petitioner's delinquency.

proposition that there must be a preliminary opportunity to contest the constitutionality of an administrative order in civil proceedings prior to facing criminal charges for its violation.

Ex Parte Young, 209 U. S. 123 (1908); and *Oklahoma Operating Company* v. *Love*, 252 U. S. 331 (1920), both require judicial review at an earlier stage than as a defense to a criminal prosecution where the penalty for being wrong is so great as to deter challenge to the validity of agency action.

Petersen v. *Clark, et al.*, Civil No. 47888 (N. D. Cal. 1968), held Section 10(b)(3) unconstitutional on the ground that "judicial review cannot be conditioned on the risk of incurring a substantial penalty or complying with an invalid order." The case also holds that "allowing civil review in advance of criminal prosecution would not disrupt the Selective Service System."

B. *In Cases Where a Board Order Affects Rights Safeguarded by the First Amendment, the Federal Courts Have Jurisdiction to Protect Those Rights.*

Even if Section 10(b)(3) is not unconstitutional in the generality of cases, it should be held inapplicable in the present case where it is the interest of the First Amendment which is at stake. Petitioner having been punitively reclassified because of his protest against the war, to allow him to raise his claims only in a criminal prosecution, effectively nullifies his First Amendment rights and deters the exercise of those rights by others. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Wolff* v. *Selective Service*, 372 F. 2d 817 (2d Cir. 1967).

C. *The "Special Circumstances" of This Case Require Judicial Review.*

Notwithstanding legislative efforts to preclude or defer judicial review of administrative orders, the "special circumstances" rule has been applied to allow review where an administrative agency has exceeded its jurisdiction or where strict application of the statutory limitations on judicial review will result in needless detention or prosecution. The application of that rule is appropriate here where the local board exceeded its jurisdiction. To require that petitioner needlessly run the risk of criminal prosecution or detention in order to establish that the Local Board exceeded its jurisdiction warrants application of the "special circumstance" rule. *Leedom* v. *Kyne,* 358 U. S. 184 (1958); *Lipke* v. *Lederer,* 259 U. S. 557 (1922); *Harmon* v. *Brucker,* 355 U. S. 579 (1958); *Wolff* v. *Selective Service, supra; Shaughnessey* v. *Pedreiro,* 349 U. S. 48 (1955); *Rusk* v. *Cort,* 369 U. S. 367 (1962).

D. *Congress, in Enacting Section 10(b)(3), Did Not Intend to Bar Suit Such as the Present One.*

In adopting Section 10(b)(3), Congress intended only to codify existing law including cases like *Wolff* v. *Selective Service, supra,* and others which recognize a broader scope of judicial review in the Selective Service area. The argument that Section 10(b)(3) reflects displeasure with *Wolff* v. *Selective Service* and the intent to overrule it, can be found to be consistent with the exhaustion and justiciability aspects of *Wolff* rather than with the repudiation of its constitutional base.

II. The Declaration of Delinquency, Punitive Reclassification and Order to Report for Induction in This Case Are Invalid.

A. *Petitioner's Reclassification Is Contrary to an Exemption Expressly Granted by Statute.*

Administrative agency action which flies in the face of explicit statutory language is a nullity. *Estep* v. *United States,* 327 U. S. 114 (1946); *Leedom* v. *Kyne, supra; Harmon* v. *Brucker, supra; Quaid* v. *United States,* 386 F. 2d 25 (10th Cir. 1968). Consequently, withdrawal of petitioner's IV-D classification, conferred by statute, is invalid.

B. *Punitive Reclassification Is Not Authorized by Statute.*

The Act makes no provision for induction as a summary punishment for breach of duties under Selective Service law. "Without exclusive action by lawmakers, decisions of great constitutional import and effects would be relegated by default to administrative suits . . . and not endowed with authority to decide them." *Greene* v. *McElroy,* 360 U. S. 474 (1959).

C. *Punitive Reclassification Is Not Authorized by the Regulations.*

Selective Service Regulations do not provide for reclassification and induction as a punishment for the breach of duties under Selective Service law. The sole function of the delinquency procedure is to secure information required by local boards to enable them intelligently to perform their classification function. Delinquency is analogous to civil contempt. Regulation 1617.1 cannot be enforced through the delinquency procedure because the possession

requirement does not serve the information gathering function of the delinquency procedure. Application of the delinquency procedure to enforce Reg. 1617.1 is to use that procedure as a form of criminal contempt designed to punish for past acts, rather than as civil contempt to secure compliance with the Regulations.

D. *Punitive Reclassification Is Unconstitutional.*

The use of the delinquency Regulation in this case and petitioner's subsequent reclassification and induction is punishment. *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963). Consequently, the procedures leading up to petitioner's order to report for induction are unconstitutional because punishment cannot be imposed without procedural due process of law including the right to counsel, confrontation and cross-examination, compulsory process, privilege against self-incrimination, an impartial tribunal, a public trial, and a jury trial, none of which were available to petitioner.

E. *Local Board 11 Did Not Follow the Procedure for Punitive Reclassification Required by the Regulations and by Due Process.*

By concurrently declaring petitioner to be a delinquent and reclassifying him I-A, Local Board 11 violated Selective Service Regulations and due process of law. The purpose of a delinquency notice is to afford a registrant reasonable time to clear up his delinquency status and to avoid reclassification into I-A. But simultaneous reclassification deprives the delinquency notice of any function whatsoever. The opportunity to have a I-A classification removed is not the same as the right to show in advance that there is no occasion to reclassify to I-A.

III. Petitioner's Act of Returning His Registration Certificate to Local Board No. 11 Was Conduct Protected by the First Amendment.

A. *Peaceful Conduct Which Is Relevant to the Issue Giving Rise to the Protest Is Speech Protected by the First Amendment.*

Symbolic conduct must be considered speech if it is peaceful and if it is relevant to the issue giving rise to the symbolic protest. The proposed rule permits courts to draw a sensible balance between the need for an ordered society and a need to serve the vital functions of the First Amendment. Those functions consist of insuring that there is a free market place of ideas, *Abrams* v. *United States,* 250 U. S. 616 (1919), to insure that the government will be responsive to the wishes of the people, *Stromberg* v. *California,* 283 U. S. 359 (1931), and to preserve a stable and just society by enabling citizens to express their grievances in a peaceable way. *Whitney* v. *California,* 274 U. S. 357 (1927).

B. *Under the Tests for Determining When Speech May Be Abridged, the Surrender of Draft Cards Cannot Be Penalized.*

1. Reg. 1642.4(a) Upon Which Petitioner's Delinquency, Reclassification, and Induction Order Are Based Is Vague and Overbroad.

Reg. 1642.4(a) upon which petitioner's delinquency, reclassification, and induction order are based is vague and overbroad. Under Reg. 1642.4(a), not only petitioner's conduct, but other conduct unarguably protected by the First Amendment, has been the basis for delinquency and reclassification. The Regulation, therefore, runs afoul of the

rule which condemns statutes or regulations with an "overbroad sweep . . . [which] lend themselves too readily to denial of [First Amendment] rights." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Cox* v. *Louisiana*, 379 U. S. 536 (1965).

2. Plaintiff Is Being Unlawfully Punished Under Past and Present Interpretations of the Balancing Test.

O'Brien v. *United States*, 88 S. Ct. 1673 (1968), appears to indicate that, although First Amendment conduct cannot be regulated unless it poses *some* danger to a compelling government interest, the degree of danger need not be *substantial* in order for the government to have the right to regulate the conduct. Application of this standard to peaceful symbolic conduct opens the door to government repression of many kinds of speech—pure and symbolic. However, *O'Brien* v. *United States* also held that a restriction on speech can be no greater than is essential to further a legitimate government interest. The restriction on speech at issue in the case at bar is greater than necessary because the government can run an effective Selective Service System even though a few registrants have surrendered their Registration Certificates. Though the administrative benefits flowing from enforcement of the possession regulation are inconsequential [*Carrington* v. *Rash*, 380 U. S. 89 (1965); *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966)], the "continuing availability" of surrendered cards leaves those benefits undisturbed.

IV. There Is in Fact No Independent Requirement of Personal Possession of Registration Certificates.

Tracking the history of Selective Service Regulation 1617.1 to World War I, establishes that non-possession of a Registration Certificate is not a violation of the Regulations in itself, but is only prima facie evidence of another act which is a violation of the Regulations and of the Act, i.e., non-registration.

ARGUMENT

Introduction

Petitioner's registration certificate was one of 357 draft cards which were returned to the government at a demonstration at the Department of Justice on October 20, 1967 (Washington Post, January 25, 1968), and an additional 297 draft cards returned the next day during a demonstration at the Pentagon (N. Y. Times, December 30, 1967, p. 2).

On October 24, 1967, General Lewis B. Hershey, the Director of Selective Service, issued a memorandum to all local draft boards recommending the reclassification and induction of registrants who abandon their Selective Service registration certificates or notices of classification. Appendix, *infra*, p. 1a. Two days later, General Hershey, in a letter addressed to all draft boards, encouraged the reclassification and induction of any registrant who, among many other things, "violates the military Selective Service Act or the Regulations, or the related processes . . . ". *Ibid.*

The local boards responded promptly and affirmatively. Though counsel cannot say precisely how many registrants

have been declared delinquent, stripped of their deferments or exemptions, reclassified I-A, and ordered for priority induction into the armed forces, we have personal knowledge of no less than seventy-six plaintiffs in eighteen lawsuits who, having either been declared delinquent, or declared delinquent and reclassified I-A, are subject to priority induction or have received induction orders.[7] *Linzer, et al.* v. *Selective Service System Local Board No. 64, et al.*, No. 68 C 110 (E. D. N. Y.); *Woods et al.* v. *Selective Service Board No. 3 et al.*, No. 68 C 350 (E. D. N. Y.); *Kimball, et al.* v. *Selective Service Local Board No. 15, et al.*, No. 67/4733 (S. D. N. Y.); *Bucher, et al.* v. *Selective Service System, et al.*, No. 12, 26/67 (D. N. J.); *Collis* v. *Selective Service Local Board No. 28*, No. C-67-19-M (N. D. W. Va.); *Anderson, et al.* v. *Hershey, et al.*, No. 30729 (E. D. Mich.); *Steinert, et al.* v. *Clark, et al.*, Civil No. 48654 (N. D. Cal.); *Decker, et al.* v. *Selective Service Board No. 25*, Civil No. 49348 (N. D. Cal.); *Anderson* v. *Clark, et al.*, Civil No. 48869 (N. D. Cal.); *Goldsmith* v. *Hershey, et al.*, Civil No. 49281 (N. D. Cal.); *Kolden* v. *Selective Service Local Board No. 4*, No. 6-68-64 Civil (D. Minn.); *Breen* v. *Selective Service Local Board No. 16*, No. 12422 (D. Conn.); *Turley* v. *Selective Service System Local Board No. 134*, No. 68-290-F (C. D. Cal.); *Huey* v. *Selective Service Local Board No. 22, et al.*, No. C-225-67 (C. D. Utah);[8] *Connor*,

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[7] A "delinquent" *may* be classified I-A. Reg. 1642.12. If a delinquent is reclassified I-A, he *shall* be ordered to report for induction. Reg. 1642.13. I-A delinquents stand at the top of the order of call and are to be inducted before all other draftees. Reg. 1631.7.

[8] Huey was reclassified I-A delinquent not for turning in his draft card but for participating "in a peaceful public demonstration near the Armed Forces Entrance and Examination Station at 438 South Main Street, Salt Lake City, Utah, for the sole purpose of expressing publicly his dissent from American involvement in the Vietnam War." *Huey* Complaint, p. 2. *Huey* is an example of the

et al. v. *Selective Service Local Board, et al.*, No. Civ. 1968 —33 (W. D. N. Y.); *Colfax* v. *Selective Service System Local Bd. No. 11, et al.*, Civ. Action No. 68-432 (W. D. Pa.); *Worstell* v. *Selective Service System Local Bd. No. 7, et al.*, Civ. Action No. 68-456 (W. D. Pa.); *Zigmond* v. *Selective Service Local Board No. 16*, C. A. No. 68-368-G (D. Mass.).

Registrants who have been declared delinquent, declared delinquent and reclassified, or ordered to report for induction, include men in a variety of classifications. Some, like petitioner, had been exempt as ministers or students of the ministry; others had been deferred as students (Act, Sec. 6(h) and (i); Regs. 1622.25, 1622.26); a 37 year old registrant formerly classified V-A under Reg. 1622.50 as over-age, was reclassified I-A (N. Y. Times, December 20, 1967, p. 15); of the six plaintiffs in *Linzer* v. *Selective Service System, supra,* all but one of whom have been reclassified I-A, two had II-S deferments as students, one had been classified I-Y because "under applicable physical, mental, and moral standards [he is] not currently qualified for service" (Reg. 1622.17), one had been deferred in class III-A as a parent (Reg. 1622.30), one had been classified IV-A having completed his military service (Reg.

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punitive reclassification of a registrant pursuant to the Hershey letter of October 26, 1967. Appendix, *infra*, p. 1a. In *Peffers and Hess* v. *Selective Service Appeal Board*, No. 7469 (W. D. Wash.), two men were reclassified I-A and ordered for priority induction for distributing anti-war leaflets during their pre-induction physical examinations. The plaintiffs' deferments were restored by their boards only after suit was filed. On May 15, 1968, Local Board No. 10, Mount Vernon, N. Y., declared Daniel F. Connell III delinquent for "Counseling evasion of The Selective Service Law," and on June 27, 1968 reclassified him from III-A (Mr. Connell is married and has two children) to I-A. His case is on appeal to the State Appeal Board.

1622.40),[9] and one had been classified V-A as over the age of liability (Reg. 1622.50).[10]

Thus, petitioner is not a victim of an aberrant draft board. Though we do not know exactly how many men have been declared delinquent, reclassified, or ordered to report for induction, we know that the number is far greater than seventy-six.

Whatever the number of registrants who have been directly affected by the policy at issue here, equally significant is the number of registrants who have been silenced out of fear that, should they publicly protest against the war in Vietnam, they too will lose their deferred or exempt status. What is at stake, therefore, is the power of the government to present to a large number of young men the choice of surrendering their right to speak freely on questions of urgent public importance, or of suffering heavy penalties for exercising that right. Equally at issue is the power of the Selective Service System to deprive persons of exemptions granted by statute, and to impose punishment without due process of law under the capricious authority of a distorted "delinquency" procedure which is unauthorized either by statute or regulation.

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[9] The IV-A plaintiff was not reclassified I-A. Veterans may be reclassified I-A only with the authorization of the Director of Selective Service. Reg. 1642.12.

[10] As of December 31, 1967, there were 15,593,748 registrants in V-A. Selective Service, February 1968, p. 4.

I.

The Federal Courts have jurisdiction to hear and determine this suit.

A. *Effective Judicial Review of the Classification Orders of Local Boards Is Constitutionally Required.*

An essential ingredient of our Constitutional system is the requirement of judicial review of the orders and actions of administrative agencies. Accompanying the proliferation of such agencies at all levels of government, has been the concurrent development of the doctrine of judicial review, which holds that "[t]he acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108 (1902). See also, *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (and cases cited therein). This basic principle was clearly stated by Mr. Justice Brandeis:

> "The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." *St. Joseph Stock Yards* v. *United States*, 298 U. S. 38, 84 (1936) (concurring opinion). See also, *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287 (1920).

And Professor Louis Jaffe has concluded that ". . . in our system of remedies, an individual whose interest is acutely

and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity." Jaffe, The Right to Judicial Review I, 71 Harvard Law Review 401, 420 (1958). *Cf.* Hart and Wechsler, The Federal Courts and the Federal System, 312-40 (1953).

In numerous instances congressional legislation, such as Sec. 10(b)(3) in issue here, has purported to restrict the scope or confine the availability of judicial review of administrative orders, but this Court has interpreted such provisions to avoid constitutional infirmities. See, e.g., *Lipke* v. *Lederer,* 259 U. S. 557 (1922); *Crowell* v. *Benson,* 285 U. S. 22 (1932); *St. Joseph Stock Yards* v. *United States, supra; Estep* v. *United States,* 327 U. S. 114 (1946); *Heikkila* v. *Barber,* 345 U. S. 229 (1953); *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955); *Brownell* v. *Tom We Shung,* 352 U. S. 180 (1956); *Leedom* v. *Kyne,* 358 U. S. 184 (1958); *Rusk* v. *Cort,* 369 U. S. 367 (1962); *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10 (1963); see also, 4 Davis, Administrative Law Treatise §28.18 (1958); Jaffe, The Right to Judicial Review II, 71 Harvard Law Review 769, 770-86 (1958). Illustrative of judicial unwillingness to sanction the claim that illegal administrative action is beyond judicial scrutiny is *Estep* v. *United States,* 327 U. S. 114 (1946). Mr. Justice Douglas, writing for the Court, rejected the contention that the finality conferred upon local draft board orders by the Selective Training and Service Act of 1940 could preclude all judicial inquiry. Such orders were "final" only when they were within the board's "jurisdiction," either geographical or legal:

> "We cannot read §1[7] as requiring the court to inflict punishment on registrants for violating whatever

> orders the local board might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction." 327 U. S. at 121.

Recognizing that "[j]udicial review may indeed be required by the Constitution . . . ," the Court construed the statute so as to accord only administrative finality to the board's order and to insure a necessary measure of judicial review.

Lockerty v. *Phillips*, 319 U. S. 182 (1943), and *Yakus* v. *United States*, 321 U. S. 414 (1944), both arising under the Emergency Price Control Act of 1942, are often cited as extreme examples of judicial deference to congressional efforts to preclude federal court jurisdiction and control over the actions of administrative agencies.[11] *Lockerty* v. *Phillips* involved a suit to enjoin a threatened prosecution for violation of administrative orders under the act. The Court upheld the lower court's dismissal for want of jurisdiction. Though there is dicta in that opinion which discusses the scope of congressional control over the jurisdiction of the federal courts, 319 U. S. at 187, that extreme language has not only been criticized by scholars, see Hart and Wechsler, *supra*, at 298, but it must be read within the context of the statutory scheme which Congress had established. One aggrieved by an order by the Administrator could complain within the administrative system. But more importantly, he could then appeal to the Emergency Court of Appeals, which in its

[11] *Falbo* v. *United States*, 320 U. S. 549 (1944), is also often cited in this regard. That decision, however, was thereafter limited by the decision in *Estep* v. *United States*, *supra*.

essentials resembled an Article III court, and finally to this Court. Thus, the complainant received at least one opportunity to litigate the legality of the order in a civil proceeding and seek Supreme Court review *before* he had to become a defendant in a criminal prosecution for violation of the order. See *Lockerty* v. *Phillips*, 319 U. S. at 188-89. Cf. *Pacific Telephone and Telegraph Co.* v. *Kuykendall*, 265 U. S. 196, 204-05 (1924); *Porter* v. *Investors' Syndicate*, 286 U. S. 461, 471 (1932). Even in *Yakus* v. *United States*, *supra*, which held that one who failed to exhaust the special administrative remedies could not challenge the validity of an order as a defense to a criminal prosecution, the Court noted that there was a preliminary opportunity to contest the constitutionality of an order in civil proceedings prior to facing criminal charges for its violation.

Much more relevant here are the decisions of this Court which demonstrate that the right to effective judicial review cannot be impaired by imposing extreme burdens and penalties on the exercise of that right. Two cases which directly support this view are *Ex Parte Young*, 209 U. S. 123 (1908) and *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920). *Young* held that the Fourteenth Amendment's guarantee of due process required judicial review by civil suit where a State legislative scheme provided that the only way to challenge administrative rate-setting was to violate the prescribed rates and become subject to penalties up to five years in jail and a $5,000 fine. The Court recoiled at this deterrent to judicial review:

> "The necessary effect and result of such legislation must be to preclude a resort to the courts . . . for the purpose of testing its validity. The officers and employees could

> not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing . . .
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> A law which indirectly accomplishes a like result [making administrative orders conclusive] by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U. S. at 146, 147.

The Court held that the remedy at law was so uncertain and hazardous as to require federal equity to intervene and protect constitutional rights.

The *Love* decision carried this rationale of the time at which judicial review was mandated one step further. It held that, faced with a legislative scheme similar to that in *Young*, which only allowed judicial review of administrative orders by way of defense to contempt proceedings, a federal equity court could enjoin enforcement of the orders and the imposition of fines. Mr. Justice Brandeis held that the right to judicial review could not be made contingent upon the risk of such penalties:

> "Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the act relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of these rates." 252 U. S. at 337.

Both cases establish the principle that judicial review is constitutionally required at an earlier stage than as a defense to a criminal prosecution where the penalty for being wrong will deter legitimate challenge to the constitutional validity of a statute, regulation or order.[12]

Sec. 10(b)(3) was held invalid for this very reason in *Petersen* v. *Clark, et al.*, Civil No. 47888 (N. D. Calif. 1968), in an opinion by Zirpoli, *J.*[13] In *Petersen*, the complaint alleged that the plaintiff was conscientiously opposed to

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[12] More recently, this Court held that an alien seeking to challenge an exclusion order could bring a declaratory judgment suit to avoid having to face the "odium of arrest and detention" which a habeas corpus application would involve, *Brownell* v. *Tom We Shung*, 352 U. S. 180 (1956). For other cases which displayed a similar reluctance to allow the imposition of great burdens on the right to judicial review of an illegal administrative determination, see *Rusk* v. *Cort*, 369 U. S. 367 (1962) and *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 151-154 (1967). In *Reisman* v. *Caplin*, 375 U. S. 440 (1964), a case involving attempts to resist a subpoena under the Internal Revenue laws, the Court discussed *Young* and *Love* and concluded that the legislative scheme under review was sufficiently free from burdens: "Finding that the remedy specified by Congress works no injustice and suffers no constitutional invalidity we remit the parties to the comprehensive procedure of the Code *which provides full opportunity for judicial review before any coercive sanctions may be imposed.*" (Emphasis added.) 375 U. S. at 450. See pp. 34-41, *infra*.

[13] An original and nine copies of a certified copy of the opinion have been filed with the Clerk of the Court.

participation in war in any form though willing to perform alternative service and was therefore entitled to a I-O classification under Sec. 6(j) of the Act, but that the local board had unlawfully refused to consider plaintiff's application for classification into I-O. After the plaintiff was issued an order to report for induction, he initiated a lawsuit to enjoin his induction. Unable to secure a temporary restraining order, plaintiff refused induction. The case was then referred to a statutory three-judge court on the theory that the suit challenged the constitutionality of Sec. 10(b)(3), but was thereafter remanded to one judge on the ground that the constitutionality of Sec. 10(b)(3) was "merely drawn in question," rather than challenged directly as unconstitutional, relying on *International Ladies Garment Workers Union* v. *Donnelly Garment Company*, 304 U. S. 243 (1938).

Plaintiff moved the one-judge court for an order enjoining his prosecution for failing to submit to induction and for an order holding the induction order invalid. The opinion of Judge Zirpoli followed.

As phrased by Judge Zirpoli, the issue before him involved "the specific situation where a federal administrative agency places an individual in the position of having to either: (1) comply with an allegedly invalid order when compliance may subject him to such restraint of liberty as military service entails or (2) risk criminal prosecution to judicially test the order's validity" (Opinion, p. 4).

First reviewing the power of Congress to regulate the jurisdiction of the lower federal courts, Judge Zirpoli concluded that Article III must be read in conjunction with the due process clause of the Fifth Amendment and that the latter was a limitation upon the former at least where

judicial review of administrative action was concerned. Consequently, relying upon *American School of Magnetic Healing, supra; St. Joseph Stockyards, supra; Ex Parte Young, supra; Yakus* v. *United States, supra; Estep* v. *United States, supra;* and *Crowell* v. *Benson, supra*, Judge Zirpoli concluded that "Congress cannot make selective service induction orders *un*reviewable. Due process is offended by an administrative order which demands compliance or a term of imprisonment" (Opinion, p. 14).

Proceeding to the next question, namely, whether Sec. 10(b)(3) is constitutional in confining review to criminal prosecution, Judge Zirpoli concluded that in general "judicial review cannot be conditioned on the risk of incurring a substantial penalty or complying with an invalid order" (Opinion, p. 9), but believed himself obliged, in the selective service context, to balance "the interests of the government and the individual . . . to see if what the government cannot do in other factual situations it may do when the governmental function involved is the raising of armies" (*ibid.*). He held that "allowing civil review in advance of criminal prosecution would not disrupt the Selective Service system" (*ibid.*), principally on the ground that the apprehension by the government of litigious interruptions of the induction process were baseless, that, indeed, "the court will experience a net saving in time" because "the need for a few trials will be obviated by voluntary compliance with orders which have been judicially declared valid, and some time will be saved at trials because the issue of the order's validity probably will not have to be litigated." In addition, "the need for calling and empanelling a jury will be completely eliminated." Finally, "since only the timing and not the scope of review will be affected the number of

men who will ultimately be found to have been validly classified will not be changed" (*ibid.*).[14]

Thus, there is a constitutionally protected right to judicial review and that review cannot be conditioned on harsh burdens which have the practical effect of denying any review at all. Insofar as the courts below have construed Section 10(b)(3) as placing such extreme penalties on the registrant who challenges a local board order, it would be unconstitutional.[15]

B. In Cases Where a Board Order Affects Rights Safeguarded by the First Amendment, the Federal Courts Have Jurisdiction to Protect Those Rights.

Even if Sec. 10(b)(3) is not unconstitutional in the generality of cases, we believe it should be held inapplicable

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[14] Meeting the government's argument that due process is satisfied by the availability of post-induction habeas corpus, Judge Zirpoli held that that was inadequate because the registrant must first be inducted, that induction is the equivalent of compliance with the allegedly invalid order, that the habeas remedy does not abrogate the duty to prevent the damage if possible, and that our system of justice would not tolerate deferring all "fourth or fifth amendment claims or defenses until after a factual finding that a defendant committed certain acts and require that they be raised by way of habeas corpus after confinement" (Opinion, p. 11). The Solicitor General agrees that "a habeas corpus proceeding after induction . . . is a very heavy burden to put on the citizen." Memorandum for Respondents, pp. 12-13.

[15] *Petersen* has been followed in the Northern District of California by Harris, *J.*, in *Gabriel* v. *Clark, et al.*, Civil No. 49419. In *Kolden* v. *Selective Service Local Board No. 4*, No. 19,331 (8th Cir. July 16, 1968), Blackman, *J.*, issued an injunction, pending appeal, against appellant's punitive reclassification from II-S and induction, relying on the grant at certiorari in the case at bar. Though he did not cite *Petersen*, Judge Blackman said, that "Kolden, if relief is not now granted to him, is subject to irreparable injury and that, in contrast, the appellee, if relief is granted, will be subject to little, if any, injury," thus agreeing with Judge Zirpoli's assessment that "civil review in advance of criminal prosecution will not disrupt the Selective Service System."

in the present case where it is the interest of the First Amendment which is at stake.

The concern for insuring judicial review has nowhere been more meticulous than when the rights for which the judicial power is invoked are those protected by the First Amendment. These are "preferred freedoms" which when threatened by legislative or administrative acts will be given special constitutional protection.

A review of Supreme Court decisions leaves no doubt about the primacy of First Amendment rights. The Court has expressed concern not only with direct governmental attempts to infringe those rights, but also with statutes and rules that have an indirect but deadly effect on the exercise of those rights. Of course, as is too well demonstrated by the decisions below, one of the most effective ways to destroy rights is to inhibit and frustrate the remedies available for their implementation. And it follows that the best way to cripple the remedy is to place burdensome limitations upon those who seek to exercise it. To interpret Sec. 10(b)(3) as requiring the registrant who is the object of a punitive and illegal classification and induction order, to subject himself to criminal indictment and prosecution in order to assert his claim that the board action violates his First Amendment rights, effectively nullifies those rights.

This Court has held that statutory schemes which impose an intolerable restraint and have a "chilling effect" on the exercise of First Amendment rights cannot constitutionally be allowed. See *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). *Ex Parte Young, supra,* and *Oklahoma Operating Co.* v. *Love, supra,* demonstrate that in the pro-

tection of rights of property judicial review cannot be forestalled until the point where its utilization becomes fraught with peril and hazard. *Dombrowski,* and the long line of cases it synthesized, show that rights of liberty are surely entitled to no less protection. The individual cannot be forced to choose between the Scylla of adhering to an order which may ultimately be held void or the Charybdis of disobeying an order which may ultimately be held valid. See *Yakus* v. *United States, supra* (dissenting opinion).

Dombrowski is central to this case. There, various officials of a civil rights organization were being threatened with prosecution under state statutes which appeared to be drawn in violation of the First and Fourteenth Amendments. They brought suit in the federal court seeking declarative and injunctive relief against prosecutions or the threat of the same. The suit was dismissed and this Court reversed.

After expressing its concern for considerations of federalism and noting that only "special circumstances" justify "cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution," 380 U. S. at 485, the Court pointed out that the complaint depicted a situation in which "a substantial loss or impairment of freedom of expression will occur if appellants must await the state court's disposition and ultimate review in this Court . . . " 380 U. S. at 486. Because of the "sensitive nature of constitutionally protected expression" and in light of the fact that free expression is "of transcendant value to all society," the normal rules as to standing have been relaxed in this area.

> "If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and

> tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. Cf. Ex Parte Young. . . . [W]e have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U. S. at 487.

The Court concluded that the need for "prompt judicial resolution of First Amendment claims" outweighed considerations of federalism and justified federal jurisdiction and relief.

The parallels to the instant case are apparent. Here petitioner asserts that his punitive reclassification violates his protected constitutional rights to freedom of expression (A. 5). See Point III A, *infra*. As the court below interpreted Sec. 10(b)(3), in order to secure judicial review of the invalid induction order, petitioner must violate the law, suffer the ignominy of indictment and endure the burdens of a criminal trial. The very fact of prosecution, as the Court noted in *Dombrowski*, will have the prohibited "chilling effect" on petitioner's rights and on the rights of others who protest the Vietnam war and the draft.

The effect of such towering obstacles to judicial review on other Selective Service registrants is crucial. Few will be willing to pay such a high price for the right to dissent. The result is clear. Thousands of registrants will have fewer First Amendment rights than the rest of us. They

will have to exercise their right to lawful dissent with one eye cast on their local draft board, fearful that their activities will meet with disapproval and result in reclassification. Those with valid deferments will "steer far wider of the unlawful zone." *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958). The draft boards can reclassify them I-A with impunity and dare registrants to run the hazards of criminal prosecution to prove the board wrong. In such an environment, "sensitive" constitutionally protected expression can hardly flourish as our free society demands it must.

These considerations were carefully weighed in *Wolff* v. *Selective Service,* 372 F. 2d 817 (2d Cir. 1967). Plaintiffs, registered with New York draft boards, were full-time students at the University of Michigan. As such they were classified II-S. They participated in a demonstration at a Michigan draft board, protesting the war in Vietnam. As a result they suffered the same fate as petitioner, namely, reclassification as delinquents into I-A. Claiming that such reclassification violated their rights of free speech and assembly they brought suit, prior to exhaustion of administrative remedies. The District Court dismissed the complaint for lack of a justiciable controversy and the Second Circuit reversed.

The Second Circuit found that reclassification alone posed such an immediate and irreparable injury to plaintiffs' First Amendment rights "as to require prompt action by the courts to avoid an erosion of these precious constitutional rights." 372 F. 2d at 820. The court carefully analyzed the statutes and regulations and concluded that it was not the draft board's function to punish registrants by reclassifying them for protest activities. Noting the

policy reasons which have traditionally caused judicial reluctance to interfere with the operations of the Selective Service System, the court nevertheless felt compelled to intervene:

> "Only the most weighty consideration could induce us to depart from this long standing policy. But of all constitutional rights, the freedoms of speech and of assembly are the most perishable, yet the most vital to the preservation of American democracy. Historically, these preferred and paramount rights have continually come under attack from the best intentioned sources. And once the erosion of these rights is permitted to begin, it is exceedingly difficult to halt and the intervening damage may be irreparable. Here it is the free expression of views on issues of critical current national importance that is jeopardized. On such topics perhaps more than any other, it is imperative that the public debate be full and that each segment of our society be permitted freely to express its views. Thus the allegations of the complaint in this case that the draft boards have unlawfully suppressed criticism must take precedence over the policy of non-intervention in the affairs of the Selective Service." 372 F. 2d at 822.

Finally, the court summarized the thrust of the cases leading up to *Dombrowski*:

> "It has been held repeatedly that the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly. . . . Since it is the

> mere threat of unconstitutional sanctions which precipitates the injury, the courts must intervene at once to vindicate the threatened liberties." 372 F. 2d at 824. (Citations omitted.)

The *Wolff* decision held that judicial relief was available to vindicate First Amendment rights threatened only by reclassification. *A fortiori* the case for judicial intervention is even greater when, as here, an induction order has already issued.

The rule which emerges is clear: where governmental action has a "chilling effect" on First Amendment rights, a federal court has jurisdiction to hear the suit and safeguard those rights. A decision which held that there can be no federal relief would raise serious constitutional questions. In order to avoid constitutional infirmities, we urge that where a board order has a "chilling effect" on registrants' First Amendment rights, the federal courts have jurisdiction to review prior to induction. Cf. *Dombrowski* v. *Pfister, supra* at 485; Note, 81 Harv. L. Rev. 685-690 (1967). Under this construction, not every board order would give rise to federal jurisdiction. For the purposes of this case it is only necessary to hold that in the exceptional case which stems from the First Amendment, the policy of orderly conscription must give way to the compulsion of the Constitution. See Layton and Fine, "The Draft and Exhaustion of Administrative Remedies," 56 Geo. L. J. 315 (1967).[16]

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[16] Nor is the thrust of this argument blunted by the assertion that, on the merits, petitioner's First Amendment claim is invalid. Whatever the disposition of his claim on the merits, he has standing to present that issue. *Dombrowski, supra,* at 485, 492; *Freedman* v. *Maryland,* 380 U. S. 51 (1965). The appellants in

C. The "Special Circumstances" of This Case Require Judicial Review.

The Solicitor General, in his Memorandum for Respondents filed in this case, urged upon the Court the view that the action of the Local Board was invalid because it was "in fact contrary to an exemption which has been expressly granted by statute" (p. 12). For that reason, said the Solicitor General, Sec. 10(b)(3) ought not be deemed a bar to this suit because "there is room for an appropriate distinction between an order which is contrary to the terms of a statute and an order which is subject to challenge only on the ground that the board has misapplied or abused its authority in making its judgment. Cf. *Harmon* v. *Brucker*, 355 U. S. 581-582; *Leedom* v. *Kyne*, 358 U. S. 184, 188" (*ibid.*). It was also the Solicitor General's view that to require petitioner to raise his defenses in a criminal prosecution or in a habeas proceeding would be "a very heavy burden to put on the citizen if the board has in fact acted contrary to the terms of the statute—which is the situation here . . . " (p. 13).

Thus, the Solicitor General has acknowledged both that the Local Board's action was invalid, and that Sec. 10

Wolff were themselves ultimately convicted in state court for the very conduct which was the basis of their reclassification, *Brothman* v. *Michigan*, 379 Mich. 776, cert. denied, 36 U. S. L. Week 3287 (January 16, 1968), but as the Second Circuit said, " . . . it is not the function of local boards . . . to punish these registrants by reclassifying them I-A because they protested as they did over the Government's involvement in Vietnam," 372 F. 2d at 822. Furthermore, *Freedman* teaches that when administrative action *may* threaten First Amendment rights, judicial review must not only be available, but that it must be quick and efficacious. *Dombrowski* goes beyond *Freedman* to hold that a civil forum must be provided if the criminal forum is fraught with peril for the right to dissent.

(b)(3) is no bar in this suit to securing judicial relief from the invalid act.

Needless to say, the Solicitor General's view is quite agreeable to petitioner. But the Court need not rely only on the parties' *entente cordiale* in order to dispose of this case on those grounds, for there is ample precedent for support in law.[17]

The Solicitor General has in effect urged the Court to adopt the "special circumstances" exception which has been applied in several areas of the law where, though legislation purports to preclude or defer judicial review of administrative orders, the courts believe immediate review to be constitutionally necessary.

In *Leedom* v. *Kyne,* 358 U. S. 184 (1958), the NLRB, acting contrary to the flat prohibition of the statute, had included professional employees within a bargaining unit without a vote of those employees. In an action brought by the Engineers Association to set aside the Board's action, the Board argued that the courts had no jurisdiction except by a petition for enforcement or review of an order restraining an unfair labor practice, as the statute provided. But the Court held:

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[17] The discussion which follows is confined to the Sec. 10(b)(3) question. It subsumes the correctness of the view that the Local Board's action was invalid. Though we subscribe to and discuss, *infra,* Point II A, the view that the Local Board's action was invalid because it is in flat contradiction to a mandatory statutory exemption, we also advance other grounds upon which that action can be held invalid. See Points II and III, *infra.* Though the Solicitor General has so far taken the position that Sec. 10(b)(3) is no bar to review only insofar as the Local Board action was contrary to the statutory exemption, our position is that any of the several invalid board practices which we describe should be reviewable in a pre-induction civil suit because each of them exceeded the Local Board's power.

"This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U. S. at 190.[18]

The Court has given similar treatment to the statute prohibiting the enjoining of tax collections. Section 3224, Revised Statutes,[19] provided that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." During prohibition, Lipke was arrested for selling liquor. While his prosecution was still pending he was served with notice that a tax was to be levied, under Sec. 35 of the Prohibition Act, upon his sale of liquor. Lipke sued for an injunction to restrain the collection of the tax. The Government argued that Sec. 3224 prevented the issuing of the injunction. This Court held that the tax sought to be levied was not a tax but a penalty, and to allow its collection would be a denial of due process because there was no provision in the Prohibition Act for a "fair opportunity for hearing." *Lipke* v. *Lederer*, 259 U. S. 557, 562 (1922). Therefore, despite Sec. 3224, an injunction should have been issued.

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[18] This "exception" for orders in excess of the Board's jurisdiction was extended to include the case of an order which caused international repercussions. *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963). Cf. *Boire* v. *Greyhound Corporation*, 376 U. S. 473, 481 (1964), which declined to apply the special circumstances rule because the issue before the court, unlike the case at bar, was "essentially a fact question;" and *Schilling* v. *Rogers*, 363 U. S. 666, 676-677 (1960), which excluded a judicial remedy under the Trading With the Enemy Act because it was not charged that the administrative official had "acted beyond the scope of his powers . . ."

[19] Now 26 U. S. C. Sec. 7421.

Since *Lipke* the Court has interpreted Sec. 3224 and its successor statutes to allow injunctions when legal remedies were insufficient. Thus in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 (1932), the Court held that respondent's product was not within the tax statute, that imposition of the threatened tax was "arbitrary and oppressive," and that its business would be destroyed if it were required to pay the tax. In the light of these "special and extraordinary facts and circumstances" the Court held that an injunction was proper. See also *Allen* v. *Regents*, 304 U. S. 439 (1938); *Smith* v. *Flinn*, 261 F. 2d 781 (8th Cir. 1958).

In military and draft cases the Court has also liberally construed limitations on review in order to assure equitable results. Thus, in *Harmon* v. *Brucker*, 355 U. S. 579 (1958), petitioner had been issued an other than honorable discharge from the Army because of pre-induction political activity. He brought an action to direct the issuance of an honorable discharge. The government contended that judicial review was forbidden by 38 U. S. C. §693(h) which provided that administrative determinations relating to the quality of discharges were "final". The Court rejected the contention on the ground that the Army officials had acted "in excess of [their] express or implied powers." 355 U. S. at 582.[20]

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[20] Cf. *Orloff* v. *Willoughby*, 345 U. S. 83 (1953), which is often cited as supporting unreviewability. Professor Davis notes that "The denial of review, however, is weakened by the fact that the Court also held that the applicable statute did not entitle Orloff to a commission and that 'enough appears to make plain that there was cause for refusing him a commission.'" 4 Davis, Admin. Law Treatise 30.

Wolff v. *Selective Service, supra,* itself a "special circumstance" case, noted other similar cases in the area of selective service:

> "Wholly aside from the First Amendment considerations which we believe compel our intervention at this time, it has in the past been suggested that when a local board acts in flagrant disregard of the applicable regulations and thus in clear excess of its jurisdiction, the courts may intervene at any time to rectify the situation. Thus in *Schwartz* v. *Strauss,* 206 F. 2d 767 (2 Cir. 1953), Judge Frank remarked that he had no doubt that a court would have jurisdiction to review a classification where on undisputed facts the board's lack of jurisdiction was manifest. On the merits, however, he found that the board had acted properly as a matter of law. And in *Townsend* v. *Zimmermann,* 237 F. 2d 376 (6 Cir. 1956) Judge Stewart, now Justice Stewart, enjoined a threatened induction when it appeared clearly as a matter of law that the board had violated the regulations in issuing its order." 372 F. 2d at 826.[21]

This Court has also made expansive provision for judicial review in the area of immigration law in order to avoid the need of subjecting litigants to imprisonment as a condition precedent to review. Thus, in *Shaughnessy*

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[21] Sec. 10(b)(3), which by its term precludes judicial review only of "the classification or processing of any registrant," can be read to exclude an act wholly outside a board's jurisdiction. Such a lawless act cannot be described as "classification or processing" since those terms refer only to the ordinary, authorized activities of draft boards. See Griffiths, Some Notes on the Solicitor General's Memorandum in *Oestereich,* 1 Selective Service Law Reporter 4012 (1968) (hereinafter cited as S.S.L.R.).

v. *Pedreiro,* 349 U. S. 48 (1955), the question before the Court was whether a deportation order under the Immigration and Nationality Act of 1952, in face of a provision that such orders shall be "final", could be reviewed in an action for declaratory relief under Sec. 10 of the Administrative Procedure Act. It had been held in *Heikkila* v. *Barber,* 345 U. S. 229 (1953), that review in deportation cases under the Immigration Act of 1917 was confined to habeas corpus. The Court rejected the *Heikkila* holding on the ground that "it would certainly not be in keeping with either of these Acts to require a person ordered deported to go to jail in order to obtain review by a court." 349 U. S. at 51. This holding was extended to exclusion orders in *Brownell* v. *Tom We Shung,* 352 U. S. 180 (1956), on the ground that in a declaratory judgment action "the odium of arrest and detention is not present." 352 U. S. at 183.

In *Rusk* v. *Cort,* 369 U. S. 367 (1962), appellee had ostensibly been expatriated under Sec. 349(a)(10) of the Immigration and Nationality Act of 1952 for having evaded service in the armed forces. Cort, who was living abroad, instituted an action in the District of Colombia for declaratory and injunctive relief challenging the constitutionality of Sec. 349 (a)(10). The government claimed that review was limited by Sec. 360(b) and (c) of the Act which required that claimants living abroad secure a determination of their citizenship "in habeas corpus proceedings and not otherwise." The Court rejected the contention because it concluded that Congress did not intend "that a native of this country living abroad must travel thousands of miles, be arrested and go to jail in order to attack an administrative finding . . ." 369 U. S. at 375.

In the area of habeas corpus the Court has also created exceptions to legislative restraints on judicial relief. 28 U. S. C. Sec. 2254, like Sec. 10(b)(3), deals with exhaustion of remedies, and likewise codifies an area of law previously left to the courts.

Sec. 2254 in relevant part reads:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.

In *Fay* v. *Noia*, 372 U. S. 391, 434-435 (1963), a state prisoner sought federal habeas corpus. The prisoner and two codefendants had been convicted on the basis of a coerced confession. The two codefendants appealed in the State Court and lost, and then sought habeas corpus in Federal court and were freed. The prisoner did not appeal, but thereafter sought federal habeas corpus. The State claimed the writ should not be granted because under Sec. 2254 he had not exhausted his state remedies. This Court said that the statute "was enacted to codify the judicially evolved rule of exhaustion, particularly as formulated in *Ex Parte Hawke* . . . " Since the Court read *Hawke* to limit review only where state remedies were not *presently* available, it held "that Sec. 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court."

The conclusion which emerges from all these cases is that notwithstanding statutory limitations upon judicial review, the Court will expand those limits in cases where

official action is clearly without authority, or where strict application of the statutory limitation will require litigants needlessly to expose themselves to detention or prosecution.[22]

That, of course, describes the case at bar, for here the Local Board action is "lawless and beyond its jurisdiction,[23] and to demand that petitioner subject himself to criminal prosecution to establish that patent invalidity, is not only a needless exposure to the criminal process but also "requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again."[24]

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[22] The government acknowledges that to require petitioner to raise his defenses in a criminal prosecution, or in a habeas corpus proceeding after induction, "is a very heavy burden to put on the citizen. . . ." Memorandum for Respondents, p. 13.

[23] *Estep* v. *United States, supra* at 121. Mr. Justice Frankfurter said that "The objection to judicial [review] of an unauthorized exercise of powers is not weighty," *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 157 (1951).

[24] *Estep* v. *United States, supra* at 125. There must, after all, be some orders issued by Local Boards which are so thoroughly and unarguably lawless that they can be reviewed in pre-induction civil proceedings, if not simply ignored with impunity. What disposition would be made, for example, of a suit to declare invalid induction orders issued to members of this Court in light of the express Congressional deferment granted by Sec. 6(f) of the Act, to say nothing of the other grounds for deferment or exemption to which all of the Justices are presumably entitled. Cf. *Schwartz* v. *Strauss*, 206 F. 2d 767 (2nd Cir. 1953) (Frank, *C.J.*, concurring). If anything, petitioner's Sec. 6(g) exemption might be said to be more emphatic than the deferment granted by Sec. 6(f). But compare *Kimball* v. *Selective Service Local Board No. 15*, 283 F. Supp. 606 (S. D. N. Y. 1968), extending the Solicitor General's concession in this case to student II-S deferments.

D. Congress, in Enacting Section 10(b)(3), Did Not Intend to Bar Suits Such as the Present One.

In enacting Sec. 10(b)(3), Congress did not intend to preclude a suit like the instant one. It is axiomatic that a statutory construction which avoids constitutional questions is to be preferred. More particularly, the intent to exclude the jurisdiction of the federal courts must plainly appear from the language and history of the enactment. No such explicit legislative intent appears here.

This is a statute uniquely in need of instructive judicial gloss. Its legislative history indicates that Congress was interested in "restating" the law as it existed in June 1967. See, House Report No. 267, Committee on Armed Services, at 7, 30-31; Cong. Record, Vol. 113 (June 12, 1967) S.8052.

In indicating that it was "codifying" preexisting law, Congress did not make clear what law it had in mind. To be sure, the case law prior to June, 1967, contained numerous decisions which required full exhaustion of administrative remedies and stated that only a criminal defense or a habeas corpus proceeding could be utilized as vehicles for challenging the validity of a draft board order. E.g., *Witmer* v. *United States,* 348 U. S. 375 (1955); *Watkins* v. *Rupert,* 224 F. 2d 47 (2d Cir. 1955); *Tamarkin* v. *Selective Service System,* 243 F. 2d 108 (5th Cir. 1957); *Woo* v. *United States,* 350 F. 2d 992 (9th Cir. 1965). However, there were also decisions which, because of the existence of special and compelling circumstances, either departed from the strict requirements of total administrative exhaustion or allowed the draft board's order to be challenged by way of injunctive suit prior to induction. E.g., *Townsend* v.

Zimmerman, 237 F. 2d 376 (6th Cir. 1956); *Glover* v. *United States*, 286 F. 2d 84 (8th Cir. 1961); *Wolff* v. *Local Board No. 12*, *supra*; *Ex Parte Fabiani*, 105 F. Supp. 139 (E. D. Pa. 1952); *Tomlinson* v. *Hershey*, 95 F. Supp. 72 (E. D. Pa. 1949); *United States* v. *Willard*, 211 F. Supp. 643 (N. D. Ohio 1962). Cf. *Schwartz* v. *Strauss*, 206 F. 2d 767 (2d Cir. 1953) (concurring opinion). Thus, Congress should be held to have meant to include all prior law, including cases like *Wolff* and others which recognized a broader scope of judicial review in this area.

An analogous situation was presented when Congress "codified" the law governing federal habeas corpus in 1948. 28 U. S. C. 2241 et seq. In giving content to these enactments this Court relied heavily on its own prior decisions. See, e.g., *Darr* v. *Burford*, 339 U. S. 200 (1950); *United States* v. *Hayman*, 342 U. S. 205 (1952); *Brown* v. *Allen*, 344 U. S. 443 (1953); *Irvin* v. *Dowd*, 366 U. S. 717 (1959). Whenever statutory language seemed at odds with prior developed case law, this Court found that Congress had not intended to depart from established procedures or diminish known rights. The lower federal courts have taken a similar approach with regard to the recent 1966 legislation on habeas. E.g., *White* v. *Swenson*, 261 F. Supp. 42 (W. D. Mo. 1966); *Plummer* v. *Louisiana*, 262 F. Supp. 1021 (D. C. La. 1967). Thus, there is sound authority for finding a legislative intent to restate *all* prior law.

Respondents will no doubt argue that the legislative history of Section 10(b)(3) reflects displeasure with *Wolff* and the intent to "overrule" it. But that history is more consistently interpreted to indicate criticism of the exhaustion and justiciability aspects of *Wolff* rather than an effort to repudiate its constitutional basis. See Note, 81

Harv. L. Rev. 685 (1967). In *Wolff* the plaintiffs had not completed the various appeals procedures available within the Selective Service System. Here, however, petitioner exhausted those remedies and his induction was imminent until stayed. It would be a juridically empty gesture to require the one final step before his claims can become judicially cognizable.

II.

The Declaration of Delinquency, Punitive Reclassification and Order to Report for Induction in This Case Are Invalid.

A. Petitioner's Reclassification Is Contrary to an Exemption Expressly Granted by Statute.

As a duly enrolled student in a recognized divinity school satisfactorily pursuing a full-time course of instruction, petitioner was automatically entitled to an exemption from military service under Sec. 6(g). The language of that section is unambiguous; the exemption is not conditioned on the making of a request, cf. Sec. 6(i)(2), or on the performance of any duty.

Nor did Congress grant the Selective Service System the power to condition that exemption. In defining the powers of the System, Congress, in Section 10(b) of the Act, stated that the President is authorized:

> "1) to prescribe the necessary rules and regulations to carry out the provisions of this title;"

In authorizing the President to promulgate the regulations under which local boards operate, Congress clearly

intended to authorize only those regulations which implemented the substantive provisions of the Act, including, of course, that providing for the automatic Sec. 6(g) exemption. And since the President was authorized to delegate to local boards only that "authority vested in him under this title," Sec. 10(c), Congress clearly did not intend that Selective Service should do that which was forbidden the President. Thus, as the government has conceded, "The board has in fact acted contrary to the terms of the statute. . . ." Memorandum for Respondents, p. 13.

One need hardly have to rely on the citation of authority to establish that administrative agency action which flies in the face of explicit statutory language is a nullity, but authority is of course available. E.g., *Estep* v. *United States, supra; Leedom* v. *Kyne, supra; Harmon* v. *Brucker, supra; McCulloch* v. *Sociedad Nacional, supra; Quaid* v. *United States,* 386 F.2d 25 (10th Cir. 1968). As this Court said in *Peters* v. *Hobby,* 349 U. S. 331, 345 (1955), "Agencies, whether created by statute or Executive Order, must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority." See also *Greene* v. *McElroy,* 360 U. S. 474, 507-508 (1959).

B. Punitive Reclassification Is Not Authorized by Statute.

There is not a single word in the Act which so much as suggests that induction is to be used as a summary punishment for the breach of duties under Selective Service law. The word "delinquency" appears but once. In a provision added in 1967 to implement the "prime age group" idea, Congress defined such a group as "the age group from which selections for induction into the Armed Forces are

first to be made after delinquents and volunteers." Act §6(h)(1). This was in deference to the pre-existing Selective Service Regulation on order of induction. Reg. 1631.7. The amendment is perfectly consistent with a non-penal interpretation of "delinquency" status, which, it will be shown below, is the most reasonable interpretation to which the Regulations dealing with delinquency lend themselves. The legislative history of the amendment reflects no Congressional approval of the use of delinquency status and reclassification as a punitive procedure leading to the punishment of induction. Congress was concerned with the order of call, not with the totally different problems raised in this case.[25]

That induction is not authorized to be used as punishment for alleged offenses, was confirmed by the Executive Branch. In response to a letter concerning punitive reclassification from President Kingman Brewster of Yale University, Mr. Joseph A. Califano, Jr., Special Assistant to the President, wrote:

> "The President has asked me to thank you for your letter of December 21 in behalf of the Presidents of the Ivy Group of Colleges and Universities. We completely agree with the need to uphold fully the spirit as well as the letter of the constitutional assurances of due process. Any potential threat to these funda-

[25] In *United States* v. *Eisdorfer*, No. 67 Cr. 302 (E. D. N. Y. June 24, 1968), Dooling, *J.*, noted that:

> "The delinquency procedure has no statutory authorization and no Congressional support except what can be spelled out of the 1967 Amendment [to Sec. 6(h)(1)] . . . The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges." Opinion, p. 10.

mental values has no place in a democracy. As your letter states, the Selective Service System is not an instrument to repress and punish unpopular views. *Nor does it vest in draft boards the judicial role of determining the legality of individual conduct . . . . Where violations occur, the judicial system must be invoked.*" (Italics added.) N. Y. Times, December 31, 1967.

The Justice Department, likewise, does not interpret the Act to allow Local Boards to impose induction as a punishment. In response to an inquiry from Senator Hart to the Attorney General, the Department (through Assistant Attorney General Fred M. Vinson, Jr.) stated that only the punishments explicitly set forth in the Act may be imposed: "In short, where opinion is expressed, if there is no transgression of law, then no sanctions can be imposed. *If there is a transgression, then the sanctions which attach to it* are all that should be applied."[26] (Italics added.) The Department used the same language in a letter to Professor Herman Schwartz of the University of Buffalo Law School, noting that delinquency proceedings are not appropriate where there has been "a transgression," but only when an individual has failed to meet an affirmative obligation (citing failure to register, failure to report an address, and failure to report for induction). In these latter situations, the letter observed, delinquency proceedings give individuals an opportunity to avoid criminal liability by "bring[ing] themselves into compliance" with the Act.[27] It is precisely this distinction between delinquency proceedings to enforce compliance with duties

[26] Letter of January 6, 1966.

[27] Letter of January 6, 1966.

the registrant owes to his Local Board—which the Act and the Regulations may properly be read to authorize—and delinquency proceedings to impose the punishment of induction for alleged violation of law—which would violate the Constitution as well as the Act and Regulations—that petitioner relies upon here.

In concluding that the Act cannot be interpreted to authorize punitive reclassification and the penal use of induction, one should note the traditional principle that Acts of Congress be read in light of "our underlying concepts of procedural regularity and basic fair play." [28] Congress is presumed to be as concerned as the courts to protect basic rights of due process, and no statute should be construed to delegate authority to establish procedures "traditionally believed to be inadequate to protect affected persons." [29] Unless Congress "specifically has decided that the imposed procedures are necessary and warranted and has authorized their use," [30] there must be no imputation to Congress of the intention that there be any departure "from the traditional concepts of fair trial." [31] The Court has also emphasized that "Without explicit action by law makers, decisions of great constitutional import and effect would be relegated by default to administrators who . . . tice Frankfurter observed, "From a great mass of cases, running the full gamut of control over property and liberty,

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[28] *Gonzales* v. *United States*, 348 U. S. 407, 412 (1955).

[29] *Greene* v. *McElroy*, 360 U. S. 474, 504 (1959). Mr. Justice Frankfurter observed, in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168-169 (1951) (concurring opinion), that Congress, the Executive and administrative agencies have traditionally authorized and established procedures consonant with basic principles of fairness and due process.

[30] *Greene* v. *McElroy*, 360 U. S. at 507.

[31] *Estep* v. *United States*, 327 U. S. 114, 122 (1946).

there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning." [33]

are not endowed with authority to decide them." [32] Mr. Jus-

C. Punitive Reclassification Is Not Authorized by the Regulations.

If the Regulations provided for reclassification and induction as a *punishment* for the breach of duties under selective service law, they would have to be held invalid, because, as we have shown, the Act does not delegate any such power. They would also be unconstitutional, for the reasons set forth below, Point III (D). But the Regulations do no such thing, and all that is required for the decision in this case is to hold that the act of Local Board 11 in declaring petitioner a delinquent and reclassifying him I-A for turning in his registration certificate is unauthorized by the Regulations, because if the delinquency procedure has any validity at all, its application must be confined to enforcing the registrant's duty to provide the information required by local boards to enable them intelligently to perform their classification function.

The question, therefore, is whether the possession requirement of Reg. 1617.1 is the kind of "duty" which, if not performed, can be the basis for delinquency and reclassification. We believe it is not.

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[32] *Greene* v. *McElroy*, 360 U. S. at 507. As Mr. Justice Holmes once observed in a similar context: "[I]t would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man." *Milwaukee Pub. Co.* v. *Burleson*, 255 U. S. 407, 437 (1921) (dissenting opinion).

[33] *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 165 (Frankfurter, J., concurring).

The principal responsibility of local boards is to select young men for induction into the armed forces. "Classification is the key to selection . . . ", Reg. 1622.1(b), and the key to classification is "pertinent" information. Reg. 1622.1 (c).

The Act and regulations empower the boards to secure this information in a variety of ways. Sec. 15(b) of the Act provides that "It shall be the duty of every registrant to keep his local board informed as to his current address and changes in status as required by such rules and regulations as may be prescribed by the President." Pursuant to Sec. 15(b), Reg. 1641.7(a) requires every registrant "to keep his local board currently informed of his occupational, marital, family, dependency, and military status, of his physical condition, of his home address, of his receipt of any professional degree in a medical, dental or allied specialist category." Changes in any of these conditions must be reported within ten days of their occurrence. Reg. 1641.7(b) requires every registrant to "submit to his local board in writing all information which the local board may at any time request from him concerning his occupational, marital, family, dependency, or military status or his physical condition or his receipt of a professional degree."

Reg. 1622.1(c) provides that "the mailing by the local board of a Classification Questionnaire (SSS Form 100) . . . shall be notice to the registrant that unless information is presented to the local board . . . which will justify his deferment or exemption from military service the registrant will be classified in Class I-A." Furthermore, "the local board shall proceed with the registrant's classification and classify him whenever (1) he fails to return his Classifica-

tion Questionnaire . . . , or (2) he fails to provide the local board with any other information concerning his status which he is requested or required to furnish." Reg. 1623.1 (b). In addition, "The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants." Reg. 1625.1(c). Finally, local boards are authorized to receive information from state and local welfare and governmental agencies. Reg. 1621.14.

Information being indispensable to classification, the local board must have some device by which to secure that information from uninformative registrants. That device is the delinquency procedure. Regs. Part 1642.

Delinquency, properly viewed, is analogous to civil contempt. It is a procedure designed not to punish for past acts, but to coerce compliance with the procedures of the system leading up to induction. Delinquency status says to the registrant that until you bring yourself into compliance with the rules designed to enable your local board to ensure that you are properly classified, you will be treated as having waived all the benefits of the System's procedures, and therefore as available for immediate induction.[34]

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[34] "It would appear that unless it can be shown that settled administration and published instructions having the effect of rules or regulations have essentially turned the delinquency regulations into standardized compliance-securing procedures that are compatible with the Act and the valid substantive regulations adopted under it, they cannot be regarded as a legally sufficient

If delinquency status and subsequent induction is treated like civil contempt, then the constitutional problems discussed in the next section are no longer relevant.[35] It is simply the sanction which the affected person brought upon himself, and which he had full power to avoid by bringing himself into compliance with the requirements of the procedures by which registrants are processed. He could have had himself removed from delinquency status at any time, Regs. 1642.4(c), 1642.10, as the contemnor could purge himself of contempt at any time, and the coercion visited upon him relates directly and specifically to his failure to abide by the rules of the proceedings in which the coercion is applied. The delinquent, like the contemnor, is not being coerced into compliance with some legal requirement foreign to the proceedings of the body imposing the coercive sanction. No one, of course, has ever suggested that civil contempt could be used to secure compliance with law generally. That would be *punishment*. The same is true in the case of delinquency.

The tenor of the delinquency regulations (Part 1642) is certainly to this effect. They explicitly provide for the expunging of delinquency—indeed, they relax the ordinary rule that a reopening of classification cannot be had after an order to report for induction, thereby allowing the registrant to conform to the requirements of Selective Service

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authorization for reclassification or priority-of-induction that would not otherwise be authorized by the Act and valid substantive regulations adopted under it. Cf. *Panama Refining Co.* v. *Ryan*, 1935, 293 U. S. 388, 420 *et seq.*; *Zemel* v. *Rusk*, 1965, 381 U. S. 1, 17-18." *United States* v. *Eisdorfer*, *supra* at 11.

[35] See *Shillitani* v. *United States*, 384 U. S. 364 (1966). The Solicitor General, in his Memorandum for the Respondents (p. 8) accepts this civil contempt analogy.

procedure right up to the last moment. The registrant is not bound by his waiver of the System's procedural rights until he is actually in the armed forces. Up until the very last moment, by cooperating with the procedures which enable his local board to make appropriate classification decisions, he can receive consideration of his claim that he should not be considered available for immediate induction. Regs. 1642.14(b). The "Delinquency Notice" itself requests the registrant to contact his local board at once, obviously for the purpose of clearing up the alleged default.[36]

Since delinquency is a "civil" means of enabling the board to perform its classification and selection functions, clearly it cannot be used against one who does not possess his registration certificate because that fact has nothing to do with these functions. The Board's consideration of the propriety of a registrant's current classification (or a classification he claims), or its ability to maintain official contact with him, is not impeded or affected by whether or not he happens to possess the required document, as long as the registrant otherwise provides his board with the pertinent information required by the statute and regulations.

It follows from the fact that the possession requirement is not an integral part of the relationship between a Local Board and its registrants, that to use reclassification as a sanction to enforce the requirement is to use it as punishment, not as "civil" enforcement of the rules of the classification procedure. This the regulations do not and could not provide. It is as foreign to their purpose as punitive reclassification for "interfering" with Selective

[36] Appendix, *infra*, p. 2a.

Service (a crime under Sec. 12 of the Act) was held to be in the *Wolff* case. There the Court of Appeals for the Second Circuit held that "no regulation authorizes a draft board to declare a registrant delinquent or to reclassify him" for an alleged act in violation of the Act or the regulations. "[J]urisdiction over offenses of this character is," the Court continued, "exclusively granted to the District Courts. . . ." 372 F. 2d at 821-22. Delinquency proceedings, on the contrary, are designed to give registrants an opportunity to "bring themselves into compliance with the rules of the classification procedure," as the Justice Department has observed. Acts unrelated to the classification process itself may be crimes under the Act. As such, they may be punishable—after a fair trial, before an impartial judicial tribunal, with all of the required procedural safeguards and rights. They may not, under the regulations, the Act, or the Constitution, be punished in summary proceedings appropriate only for "civil" enforcement of the rules of the classification process.

D. Punitive Reclassification Is Unconstitutional.

The purpose of reclassifying a registrant who has not cured his delinquency is to make him available for immediate induction. Reg. 1642.13. Selective Service is quite candid about this, observing that "Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries" induction is preferable to prosecution for "minor infractions of rules during [a registrant's] selective service processing."[37] Reclassification of

[37] Selective Service System, Legal Aspects of Selective Service (1963), p. 42. Both the Selective Service System and the Department of Justice, during World War II, had candidly referred to the reclassification of delinquents as an "administrative pen-

delinquents, therefore, is directed toward the sanction of an induction order. Consideration of the validity of such reclassification for violation of a requirement of the Act or Regulations cannot be separated from questions concerning the permissibility of using induction as a punishment, and the procedures required in order to do so. When the "delinquency" is based upon an alleged act in violation of law, as in this case, the use of induction as a punishment raises substantial questions about the constitutionality of the application of such a sanction. Though we argued above that the constitutional issues need not be met, because neither the Regulations nor the Act authorize the punitive use of induction, we examine here the constitutional problems that have to be faced if this is not the case.

In considering the validity of punitive reclassification, it is important to keep in mind that General Hershey has been quite candid about his purposes in directing the reclassification of persons alleged not to possess their draft cards, or who otherwise allegedly violate the Act or Regulations. He regards reclassification for "delinquency" as a legitimate punishment which the Selective Service System may impose when it determines that a registrant has engaged in "illegal activity." Letter to Local Boards, October 26, 1967 (Appendix, *infra*, p. 1a). His letter encouraged Local Boards, "if evidence of violation of the act and regulations is established," to declare the registrant a delinquent and "process him accordingly." *Ibid.* He repeated this position frequently during the ensuing con-

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alty." Enforcement of the Selective Service Law, Selective Service System Special Monograph No. 14, 56 (1951) [hereinafter Enforcement Monograph]; Supp. No. 18, Justice Department Circular No. 3421 to United States Attorneys, dated October 18, 1943 [contained in Enforcement Monograph F-67].

troversy over his "usurpation of power" in requesting draft boards to "become extra legal judges of the legality of acts of protest"—in the language of his critics. He explained that he was not attempting to "suppress lawful dissent" but only "to stop illegal activity" (New York Times, Dec. 12, 1967, p. 16, col. 1). At no point did he deny or even qualify the apparent conclusion that he contemplated use of the threat of reclassification and induction to deter what he had concluded were unlawful activities, and the actual imposition of those sanctions to punish those who, in the opinion of their Local Board, are "guilty."

The central issue is whether an induction order following upon a punitive reclassification would be penal in the constitutional sense. On this question there can hardly be doubt. The leading case on the definition of "punishment" is *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963). The Court there held unconstitutional a statute divesting of their citizenship those who leave or remain outside the United States in time of war or national emergency to avoid service in the armed forces. The statute afforded certain administrative procedures to determine the relevant facts, with judicial review, but the entire Court was agreed that if deprivation of citizenship was a "punishment" these procedures were insufficient under the Fifth and Sixth Amendments. The majority held that expatriation was in fact punishment. It was able to do so based upon extensive legislative history of the statute—which recourse is of course not available here, since only Regulations are involved. But the Court set forth the relevant criteria to be used in the absence of legislative history.

"The punitive nature of the sanction here is evident under the tests traditionally applied to determine

whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." 372 U. S. at 168-169.

Of the *Mendoza-Martinez* criteria, at least four clearly apply here.

(1) Induction "involves an affirmative disability or restraint." This could hardly be gainsaid in light of the well-recognized facts of military life; indeed, the availability of habeas corpus to secure release from the armed forces, *Eagle* v. *United States ex rel. Samuels*, 329 U. S. 304 (1946), necessarily rests upon this basis.

(2) Induction premised upon 'delinquency' "comes into play only on a finding of *scienter*." The Act makes it an offense to "knowingly" fail or neglect to perform a required duty. Sec. 12(a). The Supreme Court has imposed the same criminal *mens rea* requirement upon liability for

delinquency status, reclassification, and consequent induction. *Bartchy* v. *United States,* 319 U. S. 484 (1943).

(3) Punitive reclassification followed by induction is designed to "promote the traditional aims of punishment—retribution and deterrence." SSS Form 304 resolves any doubt on this score, for it informs the delinquent registrant that unless he brings himself into conformity with his duties under the Act and Regulations, he will be liable to reclassification to Class I-A or to prosecution. One is at a loss to imagine any functions other than deterrence and retribution which might be served by taking a registrant out of a classification in which he otherwise belongs—like IV-D (ministerial), IV-F (unfit for service), II-S (student), or III-A (dependency)—and reclassifying him for immediate induction into the armed forces.

(4) "[T]he behavior to which [punitive reclassification and induction] applies is already a crime," under Sec. 12 of the Act. *United States* v. *Kime,* 188 F. 2d 677 (7th Cir. 1951), cert. denied 342 U. S. 825 (1951); *United States* v. *Hertlein,* 143 F. Supp. 742 (E. D. Wisc. 1956).

In summary, then, induction as a sanction imposed after punitive reclassification for an alleged violation of a Selective Service duty meets the test for "punishment" set forth in *Mendoza-Martinez.*[38] It is therefore essential to consider the process of punitive reclassification to determine whether it meets the minimum constitutional standards for a procedure leading to the imposition of "punishment."[39]

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[38] See also *United States* v. *Brown,* 381 U. S. 437 (1965) for a more recent application of the test for "punishment."

[39] It should be noted that while some members of the Court in *Mendoza-Martinez* disagreed with the holding that the sanction

The essential constitutional requirements for the imposition of punishment are:

(1) *Counsel.* In Selective Service proceedings, including punitive reclassifications by which it is sought to impose induction as a punishment, there is no right to the assistance of any counsel, let alone to appointed counsel. Cf. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *In Re Gault,* 387 U. S. 1, 34-42 (1967). Reg. 1624.1(b) states: "[N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel." The courts have upheld the denial of counsel in Selective Service proceedings on the ground that they "are non-judicial in nature and clearly non-criminal." *United States* v. *Sturgis,* 342 F. 2d 328, 332 (3rd Cir.), cert. denied, 382 U. S. 879 (1965); *United States* v. *Capson,* 347 F. 2d 959 (10th Cir.), cert. denied, 382 U. S. 911 (1965). This may well be a proper analysis for the ordinary classification process, but the court's emphasis on the non-judicial, non-criminal nature of the proceedings shows how inappropriate the classification process is for determining questions of punishable guilt.[40]

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there was "punishment" (on the ground that its purpose was not to deter or to impose retribution on the individuals, but rather to "regulate" the armed forces—by maintaining their morale in the face of wartime draft evaders), the Court was unanimously of the view that "punishment" in the institutional sense can only be imposed after a trial.

[40] As if to emphasize that the Government Appeal Agents provided for in the Regulations (Reg. 1604.71) have little in common with the kind of counsel the Constitution requires, General Hershey last year requested all Agents "to make known to the local board any knowledge of . . . violations by a registrant." Letter to all Government Appeal Agents, Nov. 2, 1967. N. Y. Times, November 17, 1967.

(2) *Confrontation and Cross-Examination.* The Sixth Amendment also guarantees to the accused "the right . . . to be confronted with the witnesses against him . . .," which includes the right of cross-examination. *Pointer* v. *Texas,* 380 U. S. 400 (1965); *Douglas* v. *Alabama,* 380 U. S. 415 (1965). No such rights are provided for in the Regulations, and Part 1624 ("Appearance before Local Board") plainly does not contemplate a hearing in which a registrant accused of a violation can confront and cross-examine his accusers. See *Harris* v. *Ross,* 146 F. 2d 355 (5th Cir., 1944).

(3) *Compulsory Process.* Not only is this right not affirmatively enforced in Selective Service proceedings, but the Regulations explicitly provide that it is wholly within the discretion of a Local Board to decide whether to "*permit* any person to appear before it with or on behalf of a registrant. . . ." (Reg. 1624.1(b)). (Italics added.) It has been estimated that forty percent of all Local Boards allow no witnesses at all, and half of those which sometimes admit witnesses do so only separately from the registrant.[41] It has been held that a registrant has no constitutional or statutory right to have witnesses before his Local Board. See, e.g., *Uffleman* v. *United States,* 230 F. 2d 297 (9th Cir., 1956); *Harris* v. *Ross,* 146 F. 2d 355 (5th Cir., 1944).[42]

(4) *Self-Incrimination.* In the ordinary classification process the burden is on the registrant to establish his eligibility for a deferment or exemption. Regs. 1622.1(c); 1622.10; 1623.2. A registrant is bound to provide all re-

[41] Note, 114 U. Pa. L. Rev. 1014, 1033, n. 114 (1966).

[42] Reg. 1621.15 gives Local Boards the power to subpoena witnesses, but it seems clear that a registrant has no right to the exercise of this right in his behalf.

quired information, to notify his Board of any change in his circumstances, and to answer such further questions as his Board may ask. Reg. 1625.1; Act §15(b). As the Selective Service itself observes: "The burden now is, therefore, definitely upon the registrant to show that he should not be deemed available for immediate military service." Selective Service System, Legal Aspects of Selective Service (1963), p. 7. The situation is no different in delinquency proceedings looking toward the punitive imposition of induction. After a registrant receives SSS Form 304, the "Notice of Delinquency," it is entirely up to him to exonerate himself if he can. Unless he persuades the Local Board that he was not "guilty," he will quickly be inducted. See Regs. 1642.4, 1642.12, 1642.13, 1642.14. Cf. *Spevack* v. *Klein,* 385 U. S. 511 (1967).

(5) *Burden of Proof.* Closely connected with the accused's right to insist that the State prove its case against him is his right to demand that such proof be "beyond a reasonable doubt." See *Davis* v. *United States,* 160 U. S. 469, 486-488 (1895); *Holland* v. *United States,* 348 U. S. 121, 139-140 (1954). Obviously, since Selective Service procedure puts the burden of proving his innocence upon the accused registrant, this requirement is not met in delinquency proceedings.

(6) *An Impartial Tribunal.* The Sixth Amendment requires an "impartial jury," and an accused is also entitled to an impartial judge. *Tumey* v. *Ohio,* 273 U. S. 510 (1927). With one minor exception,[43] no change of venue or disqualification for bias (or even opportunity for recusal) is available under Selective Service procedure. Yet

[43] Reg. 1604.55. Cf. Reg. 1604.62.

the Marshall Commission documented the extraordinary prejudice against conscientious objectors which exists in at least one state.[44] Some inexcusable examples of prejudice occur in the cases. See, e.g., *Niznik* v. *United States*, 173 F. 2d 328 (6th Cir.), cert. denied, 337 U. S. 925 (1949). Surely a system which is to be used for the imposition of punishment must afford some way in which an accused can, in proper circumstances, secure an impartial tribunal.[45]

(7) *Public Trial.* The Sixth Amendment guarantees a "public trial." As the Supreme Court observed in *In re Oliver*, 333 U. S. 257 (1948), the friends, relatives and counsel of the accused have universally been held entitled to be present. Selective Service procedures, as noted above, do not contemplate anything but secret proceedings.

(8) *Jury Trial.* The Fifth Amendment guarantees this right in proceedings leading to serious punishments. See *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966). No such right is afforded in the Selective Service System.

Such, in sum, are some of the major constitutional rights which an accused faced with "punishment" must be afforded, *Kennedy* v. *Mendoza-Martinez, supra,* and which

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[44] "In Pursuit of Equity: Who Serves When Not All Serve?", Report of the National Advisory Commission on Selective Service (1967), p. 29. The Report also states that fewer than 3.3% of all Local Board members are Negro, Puerto Rican, Spanish American, Oriental or American Indian, *Id.*, p. 19.

[45] The Selective Service procedures—including those relating to delinquents—contain innumerable instances in which important decisions are left to the discretion of System personnel. See, e.g., Regs. 1642.4(c) (Local Board "may" remove registrant from delinquency status), 1642.12 (Local Board "may" classify delinquent registrant I-A). Such a thoroughly discretionary administrative system is certainly an inappropriate agency for the imposition of punishment, and particularly here where First Amendment values are involved.

have no counterpart in Selective Service delinquency and punitive reclassification proceedings. It is difficult to conceive of a proposition of constitutional law clearer than the conclusion to which this analysis inevitably leads: induction as a punishment cannot be imposed for alleged delinquency following procedures of the sort described. For as the Court observed in *Mendoza-Martinez,* "If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no farther." 372 U. S. at 167.[46]

E. Local Board No. 11 Did Not Follow the Procedure for Punitive Reclassification Required by the Regulations and by Due Process.

An administrative agency is bound to act according to its own procedural rules when its action affects a substantial interest of an individual.[47] This is true even if, absent the agency's rule, the individual would have had no due process right to the prescribed procedure.[48] As the Supreme Court held in *Estep* v. *United States, supra,* actions of a

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[46] The need for impartial, responsible enforcement is critically important when the alleged offense consists of activity claimed to be protected under the First Amendment. A prosecution in such circumstances, if it were wholly motivated by disapproval of the *content* of the political idea sought to be expressed, would certainly be invalid. But absent the open, responsible, careful procedure of a criminal trial, such impermissible criteria for enforcement are necessarily of such "low visibility" that constitutional supervision is virtually impossible. See *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 900-901 (1961) (Mr. Justice Brennan, with the Chief Justice and Justices Black and Douglas, dissenting).

[47] Jaffe, Judicial Control of Administrative Action 587 (1956).

[48] *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954); *Service* v. *Dulles,* 354 U. S. 363 (1957); *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959).

local board in derogation of the Act or valid regulations made under it are "lawless and beyond its jurisdiction."[49] Scrupulous adherence by local boards to the procedural requirements of the regulations is also demanded by the congressional admonition in Sec. 1(c) of the Act that the system be "fair and just," and is particularly important given the typically very limited judicial review of local board factual determinations.[50] Recognizing the need for strict procedural regularity to ensure the fairness of [illegible]ly unreviewable fact finding, courts have frequently granted judgments of acquittal, or reversed convictions, because of a procedural default in the classification process.[51] Failure of a local board to afford a registrant the procedure required by the regulations has been held to entitle the registrant, in appropriate circumstances, to an injunction against further proceedings looking toward induction until the procedural default has been rectified.[52]

Timely and adequate notice is one of the cardinal principles of procedural fairness and it has often been judicially enforced in Selective Service cases by demanding adher-

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[49] 327 U. S. at 121.

[50] See Note, *Fairness and Due Process Under the Selective Service System*, 114 U. Pa. L. Rev. 1014, 1023 (1966).

[51] "[I]t is the uniform view of the courts passing on the subject that failure to accord a registrant the procedural rights provided by the regulations invalidates the action of the local board." *Knox* v. *United States*, 200 F. 2d 398, 401 (9th Cir. 1952). See also *Gonzales* v. *United States*, 348 U. S. 407 (1955); *Simmons* v. *United States*, 348 U. S. 397 (1955); *Olvera* v. *United States*, 223 F. 2d 880 (5th Cir. 1955); *United States* v. *Vincelli*, 215 F. 2d 210, *reh. denied*, 216 F. 2d 681 (2nd Cir. 1954); *United States* v. *Burlich*, 257 F. Supp. 906 (S. D. N. Y. 1966).

[52] *Townsend* v. *Zimmerman*, 237 F. 2d 376 (9th Cir. 1956) (per Stewart, C.J., now Mr. Justice Stewart).

ence to a regulation requiring notice, or by invoking due process directly.[53] In the case of alleged "delinquents," the regulations are explicit on the subject of notice. Reg. 1642.4(a) provides that a Local Board "may declare [a registrant] to be a delinquent" if he has failed to perform a duty required of him. Reg. 1642.4(b) provides that "When the local board declares a registrant to be a delinquent, it . . . shall complete a Delinquency Notice (SSS Form 304) . . . setting forth the duty or duties which the registrant has failed to perform." The local board shall mail the original "to the registrant." Finally, Reg. 1642.10 provides that "No delinquent registrant shall be placed in Class I-A, Class I-A-O, or Class I-O . . . unless the local board has declared him to be a delinquent in accordance with the provisions of Section 1642.4 and thereafter has not removed him from such delinquency status." The orderly procedure contemplated by these regulations (and the rest of Part 1642) could hardly be clearer: (1) information comes to the attention of the local board indicating that a registrant is delinquent; (2) the local board declares that that is the effect of the information and notifies the registrant; (3) the registrant is afforded a reasonable time to clear up the matter (see Reg. 1642.4(c)); (4) only if, after a reasonable time, the board "has not removed him from such delinquency status" may it proceed to reclassify him based upon his delinquency status (Reg. 1642.10). This is a clear and simple procedure, and in it SSS Form 304 performs the indispensable function of notice. SSS Form 304 is itself perfectly explicit as to its purpose. It tells the registrant why he has been placed in delinquency status, it directs him to communicate at once with his local board

[53] See, e.g., *United States* v. *Vincelli, supra; United States* v. *Stiles*, 169 F. 2d 455 (3rd Cir. 1948); *United States* v. *Thompson*, D. C. Mass., 1 S. S. L. R. 3059 (1968).

or to seek advice from the local board nearest him, and it notifies him that his alleged breach of duty is both a crime and that, if not cleared up, it may result in a I-A classification.

The by now familiar local board practice of sending both a delinquency notice and a notice of reclassification on the same day is, therefore, forbidden by the regulations. Such a procedure deprives the delinquency notice of any function whatsoever. How can a registrant who receives both notices the same day clear up the matter with his local board, as SSS Form 304 requires him to do lest he be reclassified I-A? How can he remove the delinquency after reasonable notice, as Regs. 1642.4(c) and 1642.10 contemplate?

The purpose of the procedure set out in the regulations is apparent. Many seeming delinquencies may when brought to the attention of the registrant be quickly cured, or turn out not to exist. The regulations would be unreasonable, and perhaps even void, if a declaration of delinquency could be coupled with a simultaneous reclassification to I-A with the consequent immediate exposure to an induction order which the regulations provide.[54] The Supreme Court has recently reemphasized the constitutional requirement of notice *in advance of proceedings*, holding that notice at an initial hearing, with opportunity for a postponement, is constitutionally insufficient.[55] The mere availability

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[54] Reg. 1642.13. That SSS Form 304 must be sent a reasonable time prior to action by the local board predicated on the delinquency status is exemplified by the case of the registrant who is already I-A. Obviously, he cannot be ordered inducted before he has had a reasonable chance to respond to the Notice of Delinquency.

[55] *In re Gault*, 387 U. S. 1, 32-33 (1967). See also *United States* v. *Thomson*, 1 S. S. L. R. 3059 (D. Mass. 1967).

of a hearing *after* reclassification is no substitute for timely notice. No lawyer will believe that the opportunity to have a I-A removed is the same as the right to show, in advance, that there is no occasion to reclassify to I-A.

Also to be disposed of is any idea that failure to give timely and proper notice may be a trivial default which could not cause prejudice. This is not a mere formal default, properly treated as *de minimis*. The critical procedural right to proper, timely notice is denied. As this Court said of a similar procedural error, "This is not an incidental infringement of technical rights. Petitioner has been deprived of . . . a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation." *Simmons* v. *United States*, 348 U. S. 397, 406-407 (1955).

III.

Petitioner's act of returning his registration certificate to Local Board No. 11 was conduct protected by the First Amendment.

A. Peaceful Conduct Which Is Relevant to the Issue Giving Rise to the Protest Is Speech Protected by the First Amendment.

Petitioner agrees with this Court's statement in *United States* v. *O'Brien*, 88 S. Ct. 1673 (1968), that it is untenable to assert that any conduct whatsoever, intended to express an idea, can be labelled speech. 88 S. Ct. at 1678. However, we believe that, at the very least, symbolic conduct must be considered speech if it is peaceful and if it is relevant to the issue giving rise to the symbolic protest. For example,

a peaceful march in support of better job opportunities for Negroes should be considered speech because the march *is* peaceful and because that form of demonstration is a relevant and traditional method of voicing protest over civil rights and economic issues. On the other hand, the surrender of drivers' licenses to protest the war need not be considered speech, since the duty to carry a driver's license has no relationship to war. Thus, in this case, the surrender of petitioner's Registration Certificate to protest the war should be held to be protected speech. Not only is its surrender a peaceful act, but since it is also a part of the government's system for fighting a war, the surrender is a particularly relevant form of protest.

The rule we propose—that symbolic conduct should be considered speech if it is both peaceful and relevant to the issue giving rise to the protest—permits courts to draw a sensible balance between the need for an ordered society and the need to serve the vital functions of the First Amendment. The need for an ordered society is served because people will not be free to engage in any conduct which they choose to describe as symbolic speech even though it expresses an idea; they can engage only in conduct relevant to the issue which led to the protest. The vital functions of the First Amendment will be served because those functions are implemented by peaceful relevant conduct.

One critical function of the First Amendment is to insure that there is a free marketplace of ideas. *Abrams* v. *United States,* 250 U. S. 616, 630 (1919). The First Amendment reflects the view that no government, no writer, no scientist, no critic, has a monopoly of the truth, and that the truth is best approached by encouraging all people to contribute

to the political dialogue. This function is implemented by treating peaceful relevant conduct as speech, particularly in view of the realities surrounding access to the instruments of mass communication.

It is a hard fact of today's world that the communications media are the key to whether or not the marketplace of ideas can function effectively under modern conditions. See Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1641-1656 (1967).[56] The ideas of scores of millions are shaped by television, movies, national magazines, and newspaper monopolies. When private citizens are unable to secure access to these media, as is normally the case, they are deprived of the opportunity to contribute effectively to the process by which public opinion is formed. This renders the marketplace theory of speech more myth than reality, and the imbalance is exacerbated when, as is too often the case, the national media do not undertake themselves to circulate the ideas and grievances of the citizens who are frozen out of the free speech marketplace.[57] However, it is also a hard fact of today's world that the national media customarily treat peaceful symbolic conduct such as demonstrations, marches, surrender of draft cards, and other *dramatic* and *graphic* conduct, as news.[58] Thus, those who normally are unable

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[56] For discussion of the crucial role of the mass media in shaping public opinion and of the disabilities faced by those who lack access to the media, see also, Velvel, *Freedom of Speech and The Draft Card Burning Cases*, 16 Kan. L. Rev. 149, 152-153 (1968); Kamin, *Residential Picketing and the First Amendment*, 61 Northwestern U. L. Rev. 177, 214 (1966); Finman & Macaulay, *Freedom to Dissent: The Viet Nam Protests and the Words of Public Officials*, 1966 Wis. L. Rev. 632, 684.

[57] See Barron, *op. cit.*

[58] See authorities cited in note 56, *supra*.

to secure access to the media are enabled to contribute effectively to the process by which opinion is formed by attracting the attention of the media. Consequently, such conduct must be considered speech if the free speech clause is to have effective meaning under modern conditions for the scores of millions of citizens who lack access to the media.

Another critical function of the First Amendment is to aid in giving meaning to one of the fundamental tenets of our democracy: that the people have the power to insure that the government will be responsive to their wishes.[59] This First Amendment function is also served by considering peaceful symbolic conduct to be speech. Since such conduct receives widespread publicity, government officers are confronted with the diverse ideas and grievances which are held by citizens. They are thus enabled to respond to citizens' wishes and, indeed, may find that to be reelected they must respond even though they might prefer not to. Furthermore, other citizens who have not participated in the peaceful relevant conduct, will be exposed to these diverse ideas and grievances, and their consequent thought and actions will also influence the government.

Finally, the safety valve function of speech is served when peaceful relevant conduct is considered to be speech.

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[59] In *Stromberg* v. *California*, 283 U. S. 359, 369 (1931), the Court called attention to this function of the First Amendment:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

The Court reemphasized the responsiveness function of the First Amendment when it quoted the foregoing *Stromberg* statement in the relatively recent case of *Edwards* v. *South Carolina*, 372 U. S. 229, 238 (1963).

Mr. Justice Brandeis emphasized that a central function of speech is to preserve a stable and just society by enabling citizens to express their grievances in a peaceable way.[60] Engaging in peaceful relevant conduct permits citizens, who hold deep-seated grievances or ideas, to express their tensions and emotions peaceably and constructively rather than violently and destructively. Common experience teaches us that Mr. Justice Brandeis was correct when he said "repression breeds hate; that hate menaces stable government." People are more likely to work within an existing institutional system when they feel they have an opportunity to express themselves effectively within that system.

The specific act of surrendering a draft card in protest over the war meets the test suggested here for determining when conduct should be considered speech, and it is also clear that it fulfills the vital First Amendment functions stated above. It meets the proposed test for determining when conduct should be considered speech because it is peaceful and because it is a relevant method for protesting a war. The surrender of a card also fulfills the marketplace function of the First Amendment, the function of helping to insure that the government is responsive to the people's wishes, and the safety-valve function as well.

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[60] "Those who won our independence . . . knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form." *Whitney* v. *California*, 274 U. S. 357, 375-376 (1927) (concurring opinion).

B. Under the Tests for Determining When Speech May Be Abridged, the Surrender of Draft Cards Cannot Be Penalized.

1. Reg. 1642.4(a) Upon Which Petitioner's Delinquency, Reclassification, and Induction Order Are Based Is Vague and Overbroad.

Reg. 1642.4(a) authorizes declarations of delinquency (and consequent I-A classification and priority induction) of a registrant who "has failed to perform any duty or duties required of him under the selective service law. . . ." As construed by the government in this and other cases, the regulation can be and has been applied to punish a registrant for exercising First Amendment rights.

An examination of the regulations demonstrates that the delinquency provisions are designed to serve the discrete purpose of securing information needed for intelligent classification (see Sec. II C, *supra*). Consequently, the "duties required" under Reg. 1642.4(a) are properly limited to such things, for example, as the duty to return the Classification Questionnaire within 10 days (Reg. 1621.10), the duty to correct an inadequate Questionnaire (Reg. 1621.13), and the duty to report for physical examination (Reg. 1628.16). But as we have seen, the regulation has in fact been construed to include not only the alleged "duty" by petitioner to possess his registration certificate, but also the kind of "duty" said to have been owed by the appellants in *Wolff* v. *Selective Service, supra.* According to General Hershey, it could, and should, be construed also to include the "duty" not to violate the Act in its entirety, as well as its "related processes", and not to perform acts "under unfortunate influences of misdirected emotions . . . or even completely vicious efforts to cripple,

if not to destroy, the unity vital to the existence of a nation. . . ." App., *infra*, p. 1a.

A statute or regulation which lends itself to such broad interpretation runs afoul not only of the general rule against vague statutes, see, e.g., *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. Law Rev. 67 (1960), but also the rule in *Dombrowski* v. *Pfister*, *supra*, which condemns statutes with an "over-broad sweep . . . [which] lend themselves too readily to denial of [First Amendment] rights." 380 U. S. at 486.

We need not rely only on the infinite scope of the delinquency regulation as defined by General Hershey, for local draft boards have acted upon his interpretation of the regulation. In addition to the hundreds of registrants, like petitioner, who have been declared delinquent, reclassified, or ordered to report for induction for turning in their draft cards, other registrants have been subjected to the same sanctions for more bizarre reasons, though reasons which nonetheless satisfy General Hershey's expansive view of the regulation. Thus, in addition to the reclassification of appellants in *Wolff* v. *Selective Service*, *supra*, for participating in an anti-war demonstration at a Michigan draft board, sanctions have been imposed on other registrants for participating in a peaceful, public demonstration near an Armed Forces Entrance and Examination Station, for distributing anti-war leaflets during pre-induction physical examinations, and for "counseling evasion of the Selective Service Law." Footnote 8, *supra*. And a student at the University of Oklahoma, John Ratliff, was reclassified I-A by Local Board No. 76, Tulsa, Oklahoma, because "The local board did not feel that your activity as a member of

SDS is to the best interest of the U. S. Government." Letter from Local Board No. 76 to John Ratliff, dated November 13, 1967.

In *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508 (1964), this Court said, "It is a familiar and basic principle . . . that 'a governmental purpose to control or prevent activities constitutionally subject to . . . regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" And the Court reiterated the admonition set out in *NAACP* v. *Button,* 371 U. S. 415 (1963): "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions," 378 U. S. at 516.

The examples we have given of the way in which Reg. 1642.4(a) has been applied, bring it squarely within the doctrine which forbids overbroad legislation which invades rights protected by the First Amendment. Those cases having led to delinquency, reclassification, and induction orders, and the National Director of Selective Service having actively and publicly encouraged local boards to impose the same sanctions on "misguided registrants", surely the regulation has had the effect of "discouraging protected activities," *Dombrowski* v. *Pfister, supra* at 490, and "chilling . . . protected expression". *Id.* at 494. Reg. 1642.4(a) should be struck down in its entirety because to deal with "only a narrow portion of the prohibition at any one time" will not contribute "materially to articulation of the statutory standard." *Id.* at 491.

The Court's holding in *Cox* v. *Louisiana,* 379 U. S. 536, 537 (1965), applies equally here:

> "[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor."

The fact that petitioner has been penalized under an overbroad edict which vests too much power in administrators distinguishes this case from *United States* v. *O'Brien, supra.* In the *O'Brien* case, Congress had passed a statute which made it unlawful to "knowingly destroy" or "knowingly mutilate" a draft card. As the Court stressed, the statute was a narrow and precise way of regulating conduct which included elements of speech. Because it was narrow and precise, the statute did not threaten to discourage constitutionally protected activity, such as peaceful marches and dissenting speeches, and it did not give administrators the power to discourage or threaten citizens who engaged in constitutionally protected activity.

2. *Plaintiff Is Being Unlawfully Punished Under Past and Present Interpretations of the Balancing Test.*

Prior to the *O'Brien* decision, this Court had repeatedly made clear, in cases involving the question whether certain courses of conduct were constitutionally protected, that government could not penalize First Amendment conduct unless it showed a *substantial* danger to compelling governmental interests.[61] In *O'Brien,* however, the Court

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[61] That the government must show a substantial danger to compelling state interests before it can penalize First Amendment conduct was made clear in cases involving legal programs run by the NAACP and by unions, and in cases involving civil rights demonstrations. For example, in the cases involving legal programs, the

appeared to indicate that, although First Amendment conduct cannot be regulated unless it poses *some* danger to a compelling governmental interest, the degree of danger need not be *substantial* in order for the government to have the right to regulate the conduct. The Court said that a regulation is "justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction is no greater than is necessary to the furtherance of that interest."[62] The *O'Brien* formulation seems to mean that there need not be a *substantial* danger to a compelling interest. Thus, were Congress to pass a narrow and precise law banning

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states claimed an interest in preventing barratry, maintenance and champerty, and in preventing lay intermediaries from controlling litigation for their own benefit rather than the client's. The Court balanced the danger to state interests against the First Amendment conduct at issue, and found the danger too insubstantial to permit the state to penalize the conduct. "We held [in *NAACP* v. *Button*] the danger of baseless litigation and conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by the State, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court. . . . Nor can the case at bar be distinguished from the *Trainmen* case in any persuasive way . . . In both cases, there was absolutely no indication that the theoretically imaginable divergence between the interests of union and member ever actually arose in the context of a particular lawsuit; indeed in the present case the Illinois Supreme Court itself described the possibility of conflicting interests as, at most, 'conceivable.'" *United Mine Workers of America* v. *Illinois State Bar Association*, 389 U. S. 217 (1967). The civil rights demonstration cases involved state interests in preventing public disorders. The Court weighed the threat to public order, and found it too insubstantial to permit the states to infringe the First Amendment conduct at issue. *Edwards* v. *South Carolina*, 372 U. S. 229, 235-236 (1963); *Cox* v. *Louisiana*, 379 U. S. 536, 544-551 (1965); *Brown* v. *Louisiana*, 383 U. S. 131, 139-140, 141 (1966).

[62] 88 S. Ct. at 1679.

peaceful marches outside of draft boards because these protests dissuade a few citizens from volunteering for the service, the statute could be upheld under *O'Brien,* for this congressional regulation of speech would be undertaken under the constitutional power to raise armies; its object would be to further the government's interest in promoting voluntary enlistments; the interest in promoting enlistments is not related to suppressing free speech; and the infringement on free speech would be no greater than necessary to further the interest in promoting voluntary enlistment.

But because peaceful relevant symbolic conduct plays a vital role in serving the First Amendment function of supplying the market-place with ideas, keeping government responsive to the people and providing a safety valve, the government ought not to be empowered to penalize First Amendment conduct unless that conduct poses a *substantial* danger to compelling government interests. For as the pre-*O'Brien* balancing cases demonstrate, the government can always show that First Amendment conduct poses some slight danger to compelling state interests—indeed pure speech often poses some danger to state interests—and therefore, if *O'Brien* means that conduct can be punished in the absence of a *substantial* danger, it opens the door to government repression of many kinds of speech—pure and symbolic.

We contend and will later show that petitioner's reclassification and induction notice are unlawful if, pursuant to the pre-*O'Brien* balancing cases, the government must demonstrate a substantial danger before it can penalize citizens. However, we also contend that petitioner's reclassification and induction are unlawful under the apparently more lax standards of the *O'Brien* case. For in

reclassifying and inducting men who surrender their draft cards in protest over the war, the government is restricting speech to a much greater degree than is essential to further its interest in having an efficient Selective Service System, and therefore violating the *O'Brien* requirement that a restriction on speech can be no greater than is essential to further a valid government interest.

The restriction on speech at issue in this case is greater than necessary because the government could run an effective selective service system even if no-one carried a draft card—a point virtually conceded in the government's *O'Brien* brief in the First Circuit (pp. 13-14). If the government could run an effective selective service system even though no-one carried a draft card, it can obviously run an effective system when draft cards are surrendered by a small percentage of the millions of men who are required to carry them. The restriction on speech is also greater than necessary because General Hershey's punitive edict, and the implementing delinquency regulations, not only strike at the surrender of cards, but chill many forms of expression whose constitutional legitimacy is not open to dispute and which in no way harm the draft. Finally, the restriction on speech is greater than necessary because, even if it were necessary to penalize those who surrender their cards in order to protest the draft (which it in fact is not), it is possible for the Congress to formulate a narrower and more precise regulation of speech than the Hershey edict and the delinquency regulations.

There is a further reason why the government has violated the standards set forth in *O'Brien* by reclassifying and inducting men who surrendered their draft cards in protest over the war. It is commonly accepted that General Hershey's edict was issued because of his well pub-

licized aversion to those who protest the war. The General, in his own words, believes that those who protest the war are not acting in the "national interest," are under the influence of "misdirected emotions," are acting pursuant to "illegal advice" or are engaged in "vicious efforts to cripple if not destroy, the unity vital to" our nation and liberties. It is commonly accepted, and the government has never to our knowledge denied, that General Hershey has taken it upon himself to suppress dissent over the war by reclassifying and inducting people who protest against it. Thus, the reclassification and induction at issue here were undertaken pursuant solely to suppress communication. This case, therefore, is akin to *Stromberg* v. *California,* 283 U. S. 359 (1931), in which, as *O'Brien* pointed out, the government unlawfully penalized symbolic conduct because it thought that the message contained in the symbolic conduct was harmful. General Hershey apparently thinks symbolic protestors are delivering a harmful message and must therefore be punished by reclassification and induction.

If the government cannot meet the more lax standards of *O'Brien,* then, *a fortiori,* it cannot meet the more difficult burden, established by pre-*O'Brien* balancing cases, of showing that it can penalize petitioner because the surrender of draft cards in protest over the war poses a substantial danger to the government's interest in effectively raising armies.

This Court has taken pains to point out that fundamental rights cannot be denied merely because their denial will provide some administrative benefits.[63] Indeed, it may be observed that, if the denial of important rights could be

[63] *Carrington* v. *Rash,* 380 U. S. 89, 96 (1965); *Rinaldi* v. *Yeager,* 384 U. S. 305, 310 (1966).

justified so long as the denial gives rise to some administrative benefits, there would soon be no rights or liberties left, since the work of administrative bureaucracies is always simplified by political suppression. Thus, the government ought not be able to penalize the surrender of cards unless such penalties assure administrative benefits which are necessary if selective service is to operate effectively and which are also necessary to avoid a substantial danger to a compelling government interest. We believe it clear that reclassifying and inducting men who surrender their cards do not give rise to such significant benefits, but rather, when considered in the overall operation of the selective service system, give rise only to inconsequential benefits.

That penalizing the surrender of cards does not give rise to administrative benefits which are necessary to an effective selective service system and which are therefore necessary to avoid a substantial danger to the government's interest in an effective draft is shown by the very fact that the government could efficiently raise armies even if nobody carried draft cards. It is also shown by analyzing the reasons commonly given in support of penalizing men who, for one reason or another, do not carry draft cards.[64] First, it has been asserted that the availability of registration certificates and notices of classification makes it easier to determine if a man is delinquent in his draft obligations,[65] and it is quite true that these cards will show whether a man has at least registered with selective service. However, the question of failure to register, as well as most other

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[64] These reasons have also been analyzed in Velvel, *supra*, note 56, at 163-166.

[65] *O'Brien* v. *United States*, 88 S. Ct. at 1680; *United States* v. *Miller*, 367 F. 2d 72, 80-81 (2d Cir. 1966), cert. den. 386 U. S. 911 (1967).

questions of delinquency, never arise with regard to the overwhelming majority of registrants. Further, government agents do not generally ask people to show their registration certificates or notices of classification in order initially to detect delinquencies. When government agents ask a person to show these cards, it is usually because the government already knows about a delinquency. Even if a registration certificate and notice of classification do to some degree aid in the detection of delinquents, this aid is still available when a man surrenders his card. For unlike the burning of draft cards which was at issue in *O'Brien*, cards which are surrendered remain "continuingly available" (88 S. Ct. at 1679, 1681, 1682) to Selective Service.

Another reason which has been given in support of penalizing men who do not carry draft cards is that the cards help in case of confusion in the registrant's file or its destruction.[66] The fact is, however, that the government has duplicate files on every registrant and can obtain necessary information in that way. Moreover, unlike the burning of cards, their surrender leaves them "continuingly available" in case a file is mixed up or destroyed. And if the files of a local board are destroyed by fire or other mishap, and the board wishes to rebuild them by contacting registrants, the board would first have to consult the Selective Service System's duplicate files in order to know whom to contact. Since it must consult the duplicate file anyway, the board might as easily secure the necessary information from that file rather than go through the additional and unnecessary effort of also contacting the registrants.

It has been asserted that the carrying of draft cards provides an administrative benefit because, in a time of

[66] *O'Brien*, 88 S. Ct. at 1680; *Miller*, 367 F. 2d at 81.

national crisis, they provide a quick means of determining a man's fitness for immediate induction no matter how distant he may be from his local board.[67] However, the registration certificate which petitioner surrendered does not tell a man's eligibility for induction since it does not give his classification. And in the national crisis presented by a thermonuclear attack, the overwhelming destruction of life and property suffered by both sides would make it irrelevant and impossible to induct large numbers of men immediately. Immediate induction is also irrelevant and has not been practiced in short term crises such as occurred in Lebanon and the Dominican Republic, since they are over long before men can be inducted and trained. And, immediate induction of men is irrelevant and has not been practiced in regard to long term crises such as Korea and Vietnam, where the government has adequate time to induct and train men.

It has been asserted that the carrying of draft cards provides an administrative benefit because it facilitates communication between registrants and draft boards,[68] by bearing the registrant's address and selective service number, and classification. Granting that communication is facilitated by the cards, cards which are surrendered, unlike cards which are burned, remain "continuingly available" to provide the necessary information to facilitate communication. Furthermore, the number of young men who are so unconcerned with their draft status as not to know their classification, but who nevertheless have sufficient intelligence to meet the armed forces mental standards, must be

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[67] *Ibid.*

[68] *Ibid.*

de minimis. Even when a person surrenders his Registration Certificate, he can still obtain the address of his local board, his selective service number, and his classification, from his Notice of Classification.

It has been asserted that draft cards provide an administrative benefit because they aid in detecting and tracing alterations, forgeries or other deceptive misuses of certificates.[69] However, unlike the case when draft cards are destroyed by burning, the surrender of a card may be said to increase the possibility of obtaining this benefit.

In sum, if, as petitioner believes, the government must prove a *substantial* danger to a compelling interest before it can penalize the surrender of draft cards, then the government has no power to reclassify and induct young men who surrender their draft cards as a protest over the war. For the government cannot show that the surrender of cards poses a substantial danger to the power to raise armies, and has never even made the attempt to do so.[70] It is true that the carrying of cards provides some administrative benefits to selective service, but selective service can be administered very effectively though cards are surrendered as a protest, and therefore no *substantial* danger arises when selective service does not obtain whatever administrative benefits accrue when citizens are punished for surrendering draft cards.

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[69] 88 S. Ct. at 1680.

[70] Even when Congress passed the law banning draft card burnings, a law which, as the foregoing text shows, gives rise to somewhat greater administrative benefits than are engendered by penalizing the surrender of draft cards, Congress neither gathered nor produced any factual evidence whatsoever to show that the burnings posed a *substantial* danger to selective service.

IV.

There is in fact no independent requirement of personal possession of registration certificates.[71]

Selective Service Regulation 1617.1 is titled "Effect of failure to have unaltered registration certificate in personal possession." It states first that every registrant must have his registration certificate in his personal possession at all times. The second sentence reads "The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register." Given the title, the first two sentences, and the historical background of this Regulation, it should be clear that the second sentence provides the exclusive sanction for non-possession of a registration certificate.

The initial possession Regulation under the Selective Service Act of 1917 stated that registrants would spare themselves much "inconvenience" if they carried their certificates at all times.[72] This was a reference to the fact that police officers had the duty of searching out those persons

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[71] The material in this section is based upon Dranitzke, The Possession of Registration Certificates and Notices of Classification by Registrants Under the Selective Service System, 1 S.S.L.R. 4029 (1968).

[72] The regulation (paragraph 62) provided:

> All persons registered will be furnished a registration certificate. Since all police officers of the Nation, States, and municipalities are required to examine the registration lists and make sure that all persons liable to registration have registered themselves, much inconvenience will be spared to those who are registered if they will keep these certificates always in their possession. All persons of the designated ages must exhibit their certificates when called upon by any police officer to do so.

who, although liable for registration under Sec. 5 of the 1917 Act, had not registered.[73] Such persons were taken by the police to the jail pending further instructions from the local board. During World War I, mass roundups or slacker raids were conducted by the police as a means of ensuring registration. "The individuals who were over age, or who had changed their suits of clothes that morning, or who for any other reason did not have their cards with them, lost several hours of time and were subjected to the seeming indignity of being herded together."[74] Thus, if a registrant did not carry his card, he would not be able to prove immediately that he had registered and would suffer the "inconvenience" of going to jail until he could satisfy the police that he had complied with law. The failure to possess a certificate in such circumstances was effectively treated as prima facie evidence of non-registration, at least for non-judicial purposes.

The initial regulations under the 1940 Act (as had the revised Regulations of 1917 and 1918), stated that registrants "should" carry their certificates.[75] Clearly, this was a

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[74] Selective Service System, Special Monograph No. 14, Enforcement of the Selective Service Law 13 [hereinafter cited as Monograph No. 14].

[73] See paragraph 16 of the initial 1917 Regulations and Sec. 49 of the revised 1917 Regulations.

[75] Regulations, paragraph 239 of Volume Two, "Registration," provided:

> After the registration card is completed and signed the registrar shall prepare the registration certificate and give it to the registrant. The registrar shall never fill out the certificate until after completely finishing the registration card. The registrant shall be warned that he should carry the registration certificate with him at all times, as he may be required to show it from time to time. The registrant should then be given a copy of the leaflet of instructions for registrants (Form 5).

warning to those who wanted to avoid the "inconvenience" of not being able to produce proof of registration immediately.

In 1941, the Regulation was amended to state that each registrant "must have" his certificate in his personal possession at all times. It was also expressly provided that non-possession constituted a violation of the regulations and was prima facie evidence of failure to register.[76] However, the former provision was removed after being in effect for 20 months.[77] The prima facie evidence proviso, on the other hand, has remained in the Regulation since the 1941 amendment. That non-possession was not a violation of the regulations before the addition of the "violation" clause is stated clearly by the Selective Service System, itself: "Failure to possess a Registration Certificate was not a violation prior to Apr. 17, 1941."[78] The implication is that unless this particular Regulation said "violation", the failure to possess a certificate was not a breach of the Selective Service rules. Thus, it appears that non-possession constituted a violation of the regulations only during 1941-1942. With the removal of the "violation" clause, the Regulation effectively read in the same way as had the 1917 Regulation.

This interpretation is bolstered by the history of the contemporaneous amendments to the World War II Regulations. The "violation" clause, as noted above, was added in March, 1941. Reg. 617.2, promulgated a year later, prohibited the wrongful possession of, wrongful trans-

[76] 6 Fed. Reg. 1796 (March 31, 1941). Amendment No. 22.

[77] 7 Fed. Reg. 9683 (Nov. 23, 1942). Amendment No. 101, 2d Ed. The Regulations had been renumbered and this regulation was numbered Sec. 617.1.

[78] Monograph No. 14 at 89.

fer of, or making, altering, forging, or counterfeiting of registration certificates; it also contained a "violation" clause.[79] Then on November 23, 1942, *at the same time* that the "violation" clause was deleted from Reg. 617.1, Reg. 623.61-2, which prohibited the wrongful possession of, wrongful transfer of, or making, altering, forging, or counterfeiting of notices of classification, was promulgated, and it contained a "violation" clause.[80] Both Reg. 617.2 and Reg. 623.61-2 retained these clauses while the World War II Regulations were in effect. And the present day counterpart of the latter still contains this clause.[81] The conclusion to be drawn from this series of amendments is that the "violation" clause was a necessary part of Reg. 617.1 in order for non-possession, [illegible] and of itself, to be punishable by criminal penalties or delinquency proceedings. Without this clause, the exclusive effect of non-possession was, and is now, only prima facie evidence of non-registration.[82]

That these contemporaneous changes in the Regulations were deliberate is established by the Selective Service System's official explanations of these amendments at the time. The purpose of Amendment No. 101, 2d Ed. which deleted the "violation" clause from Reg. 617.1, was

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[79] 7 Fed. Reg. 2086 (Feb. 15, 1942). Amendment No. 21, 2d Ed.

[80] 7 Fed. Reg. 9773 (Nov. 23, 1942). Amendment No. 102, 2d Ed.

[81] Reg. 1623.6. Reg. 617.2 was dropped in 1948.

[82] The intervening Regulation under the Selective Service Act of 1948 provided:

> 617.1 Effect of failure to have Registration Certicficate in possession. Every person required to present himself for and submit to registration must have a Registration Certificate (SSS Form No. 2) in his personal possession at all times. The failure of any person to have such Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register.

> To provide that any representative of the Secretary of State, any representative of the Secretary of the Treasury, or any representative of the Attorney General, who has occasion to examine registrants at places of departure, may request a registrant to exhibit his Registration Certificate; to clarify the language concerning Selective Service officials who may request a registrant to exhibit his Registration Certificate; *to delete the language stating that it is a violation of the regulations to refuse to exhibit this certificate;* and, to add that a registrant shall surrender his Registration Certificate on becoming a member of the armed forces. (Emphasis added.)[83]

And the purpose of Amendment no. 102, 2d Ed., which added Reg. 623.61-2, was

> To require a registrant to have in his personal possession at all times a Notice of Classification (Form 57); *to make it a violation of the regulations to wrongfully possess, make, alter, forge, or counterfeit such form;* and, to provide for the issuance of a duplicate, lost, mislaid, stolen, or destroyed Notice of Classification in warranted cases. (Emphasis added.)[84]

Furthermore, this exclusivity of sanction argument is supported by the rationale later put forward by the Selective Service for the promulgation of the Regulation:

> In the early stages of the 1940-7 operation, it was found most difficult to affirmatively establish that a

[83] Selective Service Regulations, Second Edition, First Printing 437 (1944).

[84] *Ibid.*

> person required to do so, had not registered. To avoid this difficulty Selective Service provided by regulation that all registered persons must have with them at all times their 'registration cards.' It was a far simpler matter to ask a man for his certificate than to establish that he had not registered in any of the 120,000 places where he might have registered.[85]

The effect of this interpretation is that non-possession of a registration certificate is not a violation of the regulations in itself, but only prima facie evidence of another act which is a violation of the regulations and of the statute, *i.e.* non-registration.

This construction of Reg. 1617.1 is supported by examination of the history of Reg. 1623.5 which states that every registrant who has been classified must have his notice of classification in his personal possession at all times. Under Section 57 of the second set of 1917 Regulations, the final notice of classification, upon its issuance to a registrant, replaced the registration card as a means of identification, *i.e.*, as prima facie evidence of registration. Its possession likewise meant no "inconvenience" in the case of a slacker raid.[86]

With the passage of the 1940 Act, there was no immediate promulgation of a regulation pertaining to possession of notices of classification. In 1942, at the time of the deletion of the "violation" provision in the registration cer-

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[85] Selective Service System, Special Monograph No. 18, p. 122 (1967).

[86] As required by Section 279 of the 1918 Regulations, the reverse side of the Final Notice of Classification stated: "Failure to comply [with the law] may subject you to detention by the police and serious personal inconvenience."

tificate Regulation, a section entitled "Effect of failure to have Notice of Classification (Form 57) in personal possession" (Reg. 623.61-1) was promulgated. It stated that those persons who have been liable for service for 6 months must have their classification notices in their personal possession at all times; however, no "effect" was mentioned.[87]

Interpolating the history of Reg. 1617.1 through the initial title of the classification notice Regulation, it is evident that non-possession of a notice of classification was meant to be prima facie evidence of delinquency. If a person who should have a classification card did not, it would be prima facie evidence of his not keeping in contact with his local board, which is a duty of all registrants; for example, Reg. 1621.10 requires a registrant to return his classification questionnaire to his board and Reg. 1641.3 requires a registrant to report changes in mailing address. Support for this interpretation is gained from the fact that the Regulation only applied to those who had been liable for service for 6 months: it was reasonable to assume that any person who did not possess a notice of classification after that period was a delinquent. Furthermore, Reg. 623.61-1 (possession of notice of classification) was patterned after Reg. 617.1 (possession of registration certificate) as Reg. 623.61-2 (fraudulent possession of notices of classification) after Reg. 617.2 (fraudulent possession of registration certificate) and Reg. 623.61-3 (duplicate notice of classification) after Reg. 617.11 (duplicate registration certificate). To interpret non-possession of a notice of classification otherwise than as prima facie evidence of

[87] 7 Fed. Reg. 9773 (Nov. 23, 1942). Amendment No. 102, 2d Ed.

delinquency would leave the original title "Effect of failure to have Notice of Classification . . ." without meaning.

The interpretation gains strong support from the Selective Service's rationale for the issuance of this Regulation in 1942:

> The new requirement had two main purposes. It was thought that requiring the possession of a Notice of Classification would encourage many men who registered but were out of contact with their local boards to get in touch with them and by so doing effect a termination of their delinquencies. The change also places law enforcement officers in a position to hold a suspected delinquent in custody if he did not have a DSS Form 57 in his possession even though he did have a registration certificate. They could determine whether the individual was delinquent before releasing him.[88]

Moreover, when Reg. 623.61-1 (possession of notice of classification) was prescribed in 1942, it contained no "violation" clause whereas Reg. 623.61-2 (wrongful or fraudulent possession or alteration of notices of classification), which was part of the very same amendment, did contain such a provision; the implication is that failure to possess a notice of classification was not a violation of the regulations. Non-possession of a classification notice is therefore only prima facie evidence of delinquency.

Thus, non-possession of draft cards is not *per se* a violation of the Selective Service Regulations—non-possession is simply prima facie evidence of another act which is a violation.

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[88] Monograph No. 14, at 55.

CONCLUSION

For the reasons set forth above, the judgment below should be reversed and the case remanded to the District Court with directions to enter judgment for petitioner.[89]

Respectfully submitted,

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Of Counsel

August 1968

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[89] The Solicitor General suggested in his Memorandum for Respondents (p. 13 n. 5) that on remand to the District Court petitioner should have the opportunity to offer proof on the issue whether the amount in controversy exceeds $10,000. Though petitioner would be prepared to do so, he also intends to seek leave to amend the complaint's jurisdictional allegation to include 28 U. S. C. Sec. 1361 and requests the Court, in its remand order, specifically to direct the District Court to allow the amendment. See Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308 (1967).

APPENDIX

APPENDIX

THE NEW YORK TIMES, THURSDAY, NOVEMBER 9, 1967

Texts of Letter and Memo on the Draft

Special to The New York Times

WASHINGTON, Nov. 8—Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen Lewis B. Hershey, and of a memorandum, dated Oct. 24, from General Hershey on draft cards:

The Letter

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The compexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military of naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with sound procedure.

Memorandum

Subject: Disposition of Abandoned or Multilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(d) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

DELINQUENCY NOTICE

20 October 1967
(Date Becomes Delinquent)

7 November 1967
(Date of Mailing)

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NUMBER 11
POST OFFICE BOX NUMBER 2105
CHEYENNE, WYOMING 82001
(Local Board Stamp)

SELECTIVE SERVICE NO.			
48	11	44	176

To JAMES (First) JAY (Middle) OESTERREICH (Last)

Address 215 Herrick Road
(Street and Number or RFD Route)

Newton Centre (City, Town, or Village) Massachusetts (State) 02159 (ZIP Code)

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service laws:

"Failure to have in his possession a duly authorized Registration Certificate (SSS Form 2)"

"Failure to provide the local board of his current status"

2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000, or by both such fine and imprisonment.

(Member or Clerk of Local Board)

INSTRUCTIONS

A Delinquency Notice (SSS Form 301) shall be prepared by the Local Board whenever it declares the registrant to be a delinquent because of his failure to perform any duty or duties required of him other than failure to comply with an Order to Report for Induction (SSS Form 252), or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153). This notice shall be prepared in triplicate, and the specific duty or duties which the registrant has failed to perform shall be described in detail in the space provided. The Local Board shall (a) mail the original to the registrant at his last known address, (b) file a copy in the registrant's Cover Sheet (SSS Form 101), and (c) mail a copy to the State Director of Selective Service.

SSS Form 304 (10-8-64)

U.S. GOVERNMENT PRINTING OFFICE : 1964 O—747 610